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HUMAN RIGHTS QUESTIONS

Allegations regarding infringements of trade union rights

Note by the Secretary-General

1. In accordance with Economic and Social Council resolution 277 (X) of 17 February 1950, the Council decided to accept, on behalf of the United Nations, the services of the International Labour Organisation (ILO) and the Fact-finding and Conciliation Commission on Freedom of Association as established by ILO. In a note by the Secretary-General (E/1991/57), which was before the Council at its first regular session of 1991, the Secretary-General provided the Council with background information on allegations of infringements of trade union rights in South Africa which had been referred to the Director-General of the International Labour Office by the Congress of South African Trade Unions (COSATU).

2. In its resolution 1991/37 of 31 May 1991, the Council, inter alia, decided to transmit to the Fact-finding and Conciliation Commission on Freedom of Association, through the Governing Body of the International Labour Office, the allegations of infringement of trade union rights made by COSATU in May 1988.

3. The report of the Fact-finding and Conciliation Commission on Freedom of Association concerning the Republic of South Africa is attached to the present note in the languages in which it was submitted. Part V contains the conclusions and recommendations.

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* E/1992/100.

INTERNATIONAL LABOUR OFFICE
BUREAU INTERNATIONAL DU TRAVAIL
OFICINA INTERNACIONAL DEL TRABAJO

**GOVERNING BODY
CONSEIL D'ADMINISTRATION
CONSEJO DE ADMINISTRACION**

GB.253/15/7
253rd Session

Geneva,
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Fifteenth item on the agenda

REPORT OF THE DIRECTOR-GENERAL

First Supplementary Report

Report of the Fact-Finding and Conciliation Commission on Freedom of Association concerning the Republic of South Africa

1. Appended to this paper is the report of the Fact-Finding and Conciliation Commission on Freedom of Association appointed by the Governing Body to examine the complaint of infringements of trade union rights in the Republic of South Africa, presented to the ILO by the Congress of South African Trade Unions in a communication dated 11 May 1988.

2. The Republic of South Africa ceased on 11 March 1966 to be a member State of the ILO although it remained a member of the United Nations. This necessitated referral of the complaint to the Economic and Social Council of the United Nations (ECOSCC) in terms of the procedure agreed upon between the United Nations and the ILO and approved by ECOSOC in resolution 277(X) adopted on 17 February 1950.

3. In accordance with this procedure the Secretary-General of the United Nations, in a note dated 21 July 1988, sought the consent of the Government of the Republic of South Africa to the complaint being referred to the Fact-Finding and Conciliation Commission. The Government's consent was notified in a communication dated 19 February 1991, and at its session held in May 1991 ECOSOC decided to refer the allegations to the ILO Fact-Finding and Conciliation Commission.

4. The Governing Body accordingly appointed, at its 250th Session (May-June 1991), a panel of three members of the Fact-Finding and Conciliation Commission on Freedom of Association to examine the complaint alleging infringements of trade union rights in the Republic of South Africa.[1]

5. In the above-mentioned resolution 277(X) the ILO is invited by ECOSOC "to make suitable arrangements which would permit the Fact-Finding and Conciliation Commission of the International Labour Organisation to transmit to the Economic and Social Council any reports or cases regarding non-ILO Members"; and "to include in the annual report of the International Labour Organisation to the United Nations an account of the work of the Commission".

6. Further, as indicated in a previous case,[2] the reports of the Fact-Finding and Conciliation Commission do not constitute judgements calling for decision by the Governing Body, but are an account of the inquiry carried out by the Commission regarding freedom of association, of which the Governing Body is invited to take note.

7. The Governing Body may therefore wish to take note of the report of the Fact-Finding and Conciliation Commission and request the Director-General:

(a) to transmit the report to the Economic and Social Council; and

(b) to include in the annual report of the International Labour Organisation to the United Nations an account of the work of the Commission.

Geneva, 18 May 1992.

POINT FOR DECISION:

Paragraph 7.

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[1] GB.250/15/26.

[2] See Minutes of the 167th Session of the Governing Body, p. 87.

PRELUDE TO CHANGE:
INDUSTRIAL RELATIONS REFORM IN SOUTH AFRICA

REPORT OF THE FACT-FINDING AND CONCILIATION COMMISSION ON FREEDOM OF ASSOCIATION CONCERNING THE REPUBLIC OF SOUTH AFRICA

International Labour Office
Geneva
1992

SUMMARY

Freedom of association in context

South Africa is a country in the throes of dramatic changes. The changes involve the abandonment of the policy of apartheid which so profoundly affected South African law and society particularly over the past 40 years. In the land of apartheid, many liberties, counted as normal in a democratic society, were diminished or lost altogether. Amongst them were the freedoms of association and collective bargaining which the International Labour Organisation (ILO) has done so much to promote and protect under international law since its establishment in 1919.

The Republic of South Africa is not a party to the Conventions of the ILO relevant to those subjects. Nor is it now a member of the ILO. However, many of the principles of the ILO on these subjects have passed into international customary law. Moreover, in a communication to the Director-General in relation to the present Commission, the Government of South Africa associated itself with the Convention on freedom of association. The task of a Commission such as the present is not to state conclusions about a country's labour laws and practices according to the personal opinions of its members. It is, instead, to measure those laws and practices against the well-established body of jurisprudence developed by the ILO during the past 70 years. This is the approach which the Commission has taken to its task. It has also, where appropriate, responded to the request of the parties that it should offer suggestions for reform of the South African system of industrial relations.

Mandate and procedures

The case before the Commission originated in a complaint by the Congress of South African Trade Unions (COSATU) that proposed amendments to the Labour Relations Act (LRA) - later enacted as the Labour Relations (Amendment) Act, 1988 - infringed the principles of international law governing freedom of association. This complaint led to the establishment of the Commission. The issues raised in the complaint were later dealt with satisfactorily in legislation adopted in 1991. Nevertheless, the parties subsequently agreed that the Commission's terms of reference should be revised to read as follows:

> To deliberate on and consider the present situation in South Africa insofar as it relates to labour matters with particular emphasis on freedom of association. (Chapter 2(d) and (e).)

Chapters 2-4 describe the procedures followed by the Commission. They summarise the principal arguments of the parties in their opening and closing submissions.

Chapters 5 and 6 describe the social context and labour relations framework within which the issues raised had to be examined. Critical to this was the system of apartheid - or separate development of the races in South Africa, now abandonded but described in Chapter 5. Chapter 6(d) summarises the system in force under the present provisions of the LRA.

Part III of the report (Chapters 7-12) describes the applicable legislative provisions governing industrial relations in South Africa, the arguments of the parties and evidence on the various issues raised by the revised complaint. It provides the background against which the conclusions and recommendations contained in Part IV should be read.

These conclusions must be read in the context of the profound changes which are now under way in South Africa. The conclusions relate essentially to two issues: first, points on which the industrial relations system as such is incompatible with the principles of freedom of association established by the ILO, and secondly, specific acts and measures taken or susceptible of being taken against trade unions and their members to diminish or impede the attainment of their legitimate functions as unions. Amongst such measures described are those taken under South Africa's elaborate security legislation.

Reform of the Labour Relations Act

On the first issue, the Government of South Africa is now committed to the reform of the LRA in consultation with the representative organisations of employers and workers. The Commission makes two recommendations concerning this process of reform. The first relates to the need to reactivate the National Manpower Commission with a structure that is reasonably acceptable to all parties concerned. The second relates to the need for a simpler and clearer text which can be easily consulted and understood (paragraphs 576 to 578).

Turning to the substance, the first of the Commission's recommendations concerns the need, as a matter of priority, to extend the rights and protections provided under the LRA to farm workers and domestic workers (paragraphs 723 to 724). The Commission also makes recommendations concerning labour relations in the public service. That service is similarly not covered by most of the provisions of the LRA (paragraphs 589 to 591, and 725 to 737).

On the contents of the Act itself, the Commission's conclusions deal with the following matters:

- provisions concerning the contents of trade union constitutions (prohibition on political affiliation or support of political candidates; discretion of the Registrar to allow or disallow provisions in a constitution) (paragraphs 580 to 583);

- registration of trade unions (unduly cumbersome procedures leaving too wide a discretion to the Registrar, particularly by virtue of the "knock-out" provision; the continuing possibility of registering trade unions limited to a single racial group which in the Commission's view should be terminated without delay) (paragraphs 584 to 599);

- the Registrar's power to conduct inquiries into trade union affairs, involving the possibility of the replacement of elected officers (paragraphs 600 to 606);

- restrictions on trade union activities (in particular in relation to fund-raising and political activities) (paragraphs 608 to 611 and 614 to 620);

- provisions regulating the right to strike (simplification of the pre-strike procedural requirements; amendment of the strike ballot provision; widening of the strike definition to allow strikes over economic and social issues; narrowing of the definition of essential services and provision of effective arbitration for all workers not allowed to strike; removal of criminal sanctions for peaceful strike action; protection of workers against dismissal for legitimate strike action) (paragraphs 639 to 670);

- executive interference in the collective bargaining process (ministerial power to refuse to promulgate collective agreements, to exempt or exclude certain areas or classes of work from collective agreements or to promulgate employment conditions proposed by employers; need for ministerial approval of stop-order agreements between an employer and an unregistered trade union) (paragraphs 612 to 613 and 708 to 711); and

- absence of guarantees of certain organisational rights or facilities (access to employer premises particularly when the workers reside in them as in the mines and agriculture; space for union meetings and business) (paragraphs 695 to 707 and 716 to 719).

Reform of other laws and practices

On the impact of security and related legislation on trade union activities, the Commission, while noting the Government's intention of proceeding to a new constitutional order under which legislation infringing fundamental rights and freedoms will disappear, examined the potential impact of the legislative provisions still in force on trade union activities. Recommendations for the repeal and reform of such legislation are made. The chilling effect of maintaining in force legislation not presently being applied provides sufficient reason, in the Commission's view, for repealing such legislation or at least exempting unions from its scope (paragraphs 621 to 638).

Concerning freedom of assembly, the Commission emphasised the importance of ensuring that legislation authorising prohibitions on gatherings should not interfere with the right to hold legitimate trade union meetings (paragraphs 624 to 627) or to picket peacefully (paragraphs 660 to 663).

On freedom of expression, while noting that the legislation objected to was of general application and thus went beyond its mandate, the Commission drew attention to the need to safeguard the publication and distribution by trade unions of news and information of legitimate interest to their members (paragraphs 628 to 634).

The Commission also recalls the principles to be observed in order to ensure that trade union rights are respected if a state of emergency is again declared under the Public Safety Act or any other legislation which replaces it (paragraphs 635 to 637).

The Commission stresses the fact oft repeated by the organs of the ILO that the rights and freedoms of trade unions and their members to enjoy freedom of association in its full sense, can only really flourish in a society which guarantees and promotes the civil and political, social and economic rights of all its members.

Considerable information was laid before the Commission concerning various forms of interference with the right of trade unions to organise.

The first of these related to physical attacks on trade unionists and trade union premises. The Commission did not need to examine and determine individual cases in order to discharge its mandate. It accepts that such incidents occurred in a context where violence was not used exclusively against trade unions. The incidence of such attacks has diminished substantially since 2 February 1990 when the State President of South Africa announced, in effect, the abandonment of apartheid and the need to establish a new policy based on democracy and non-racial principles. However, the Commission finds that the evidence suggests a pattern of violent and destructive attacks on trade unions and their members which require investigation with greater vigour and determination than has been shown so far, particularly having regard to allegations of police involvement (paragraphs 671 to 688).

The Commission notes that allegations of spying on, and surveillance of, trade unions by the authorities have already been accepted by independent judicial inquiries in South Africa. It expresses the opinion that such conduct is completely inconsistent with ILO principles on freedom of association. No recurrence of such activity should occur (paragraphs 688 to 691).

Similarly, the Government has publicly admitted that it had provided covert funding to the United Workers' Union of South Africa (UWUSA). It has now undertaken that this was being brought to an end. The Commission draws attention to the incompatibility of such funding with the independence and freedom of trade unions provided for in ILO principles (paragraphs 692 to 694).

Reform and the "homelands"

The Commission examines the special problems posed for labour relations in South Africa by the existence of the homelands, resulting in a patchwork of 11 different interacting territorial systems provided with varying degrees of "self-government" by South African law. The Commission's conclusions concerning the homelands deal with two issues.

In the first place, without examining the detail of every measure, the Commission finds that the legislation and practice in force in each of the homelands is incompatible, to varying degrees, with the international principles of freedom of association (paragraphs 738 to 743).

Secondly, it notes that the existence of different legal systems, designed, by and large, to limit trade union activity to unions registered in the territory of the homeland, imposes serious constraints on the exercise of trade union and collective bargaining rights for both workers and employers (paragraph 744).

The Commission concludes that there are a number of ways open to the South African Government - which is responsible for all the homelands in international law - to resolve these incompatibilities (paragraph 745).

Recommendations

The report concludes with a number of recommendations to the implementation of which the Commission attaches the highest importance (paragraphs 746 to 748).

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LIST OF RECURRING ABBREVIATIONS

ACTWUSA	Amalgamated Clothing and Textile Workers' Union of South Africa
AH	Afrikaanse Handelsinstitut
ANC	African National Congress of South Africa
AZACTU	Azanian Congress of Trade Unions
CAWU	Construction and Allied Workers' Union
CCAWUSA	Commercial Catering and Allied Workers' Union
CCB	Civil Cooperation Bureau
CFA	Commission for Administration
CODESA	Convention for a Democratic South Africa
COM	Chamber of Mines
COSATU	Congress of South African Trade Unions
CUSA	Council of Unions of South Africa
CWIU	Chemical Workers' Industrial Union
ECOSOC	Economic and Social Council of the UN General Assembly
FABCOS	Foundation of Black Consumers' Associations
FAWU	Food and Allied Workers' Union
FEDSAL	Federation of Salaried Employees
FITU	Federation of Independent Trade Unions
FOSATU	Federation of South African Trade Unions
GAWU	Garment and Allied Workers' Union
HARWU	Hotel and Restaurant Workers' Union
HWA	Health Workers' Association
IC	Industrial Court
ICFTU	International Confederation of Free Trade Unions
IFPAAW	International Federation of Plantation, Agricultural and Allied Workers
ILJ	Industrial Law Journal
IMSSA	Independent Mediation Service of South Africa
IOE	International Organisation of Employers
LAC	Labour Appeal Court
LRA	Labour Relations Act
LRAA	Labour Relations Amendment Act
MAWU	Metal and Allied Workers' Union
MICWU	Motor Industry Combined Workers' Union
MWASA	Media Workers' Association of South Africa
MWU	Mine Workers' Union
NAAWU	National Automobile and Allied Workers' Union
NACTU	National Council of Trade Unions
NAFCOC	National African Federated Chambers of Commerce
NCMA	Natal Clothing Manufacturers' Association
NEHAWU	National Education, Health and Allied Workers' Union
NEUSA	National Education Union of South Africa
NMC	National Manpower Commission
NUF	National Union of Farmworkers
NUGW	National Union of Garment Workers
NUM	National Union of Mineworkers
NUMSA	National Union of Metalworkers of South Africa
NUTW	National Union of Textile Workers
NUWCC	National Unemployed Workers' Co-ordinating Committee
OATUU	Organisation of African Trade Union Unity
PAEC	Pan-African Employers' Confederation
PAC	Pan-Africanist Congress of Azania
POTWA	Posts and Telecommunications Workers' Association
PPAWU	Paper, Printing and Allied Workers' Union
PSA	Public Servants' Association of South Africa
SAAU	South African Agricultural Union
SAAWU	South African Allied Workers' Union

SACC	South African Council of Churches
SACCAWU	South African Commercial, Catering and Allied Workers' Union
SACCOLA	South African Employers' Consultative Committee on Labour Affairs
SACOB	South African Council of Business
SACOL	South African Confederation of Labour
SACP	South African Communist Party
SACTU	South African Congress of Trade Unions
SACTWU	South African Clothing and Textile Workers' Union
SADF	South African Defence Force
SADWU	South African Domestic Workers' Union
SARHWU	South African Railway and Harbour Workers' Union
SC	Supreme Court
SEIFSA	Steel and Engineering Industries Federation of South Africa
TAWU	Transport and Allied Workers' Union
TBVC	Transkei, Bophuthatswana, Venda, Ciskei
TGWU	Transport and General Workers' Union
TUCSA	Trade Union Council of South Africa
TWIU	Textile Workers' Industrial Union
UWUSA	United Workers' Union of South Africa
WCL	World Confederation of Labour
WFTU	World Federation of Trade Unions
WMU	White Mineworkers' Union

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NOMENCLATURE USED

The nomenclature and terms used in this report correspond to those used in official ILO publications concerning South Africa.

Except where the report so states the publication of information in this report does not imply any expression of view by the International Labour Office on the legal status of those having been asked to communicate such information, or on their authority over the areas or territories, in respect of which such information was requested.

PART I: Referral to the Commission

CHAPTER 1

INTRODUCTION

1. On 22 June 1949 the Governing Body of the International Labour Office (ILO) adopted a resolution in which it approved the establishment of a Fact-Finding and Conciliation Commission on freedom of association for the purpose of international supervision of freedom of association. It authorised the Director-General to continue the consultations already begun with the Secretary-General of the United Nations with regard to the manner in which such a commission could most appropriately be established.[1] At its 110th Session (Mysore, January 1950) the Governing Body, in accordance with the request contained in a resolution adopted by the Economic and Social Council of the United Nations on 2 August 1949 (resolution No. 239 IX), established the Fact-Finding and Conciliation Commission on Freedom of Association.[2]

2. The procedure for the examination of allegations of infringements of trade union rights has already been described in the Report of the Fact-Finding and Conciliation Commission on Freedom of Association concerning Persons Employed in the Public Sector in Japan.[3] It has also been set out in a number of ILO official documents, in particular in a number of reports of the Committee on Freedom of Association of the Governing Body.[4] It is therefore not necessary to give any more than a brief outline of the procedure applied in the present case.

3. The function of the Commission is to examine such cases of alleged infringements of trade union rights as may be referred to it, to ascertain the facts and to discuss the situation with the government concerned with a view to securing the adjustment of difficulties by agreement; and thereafter to report to the Governing Body. In principle, no case may be referred to the Fact-Finding and Conciliation Commission without the consent of the government concerned. The only exception is in respect of any complaint relating to the application of a ratified Convention in which case the Governing Body may designate the Fact-Finding and Conciliation Commission as a Commission of Inquiry under article 26 of the Constitution of the International Labour Organisation.

4. The complaint concerning alleged infringements of trade union rights in the Republic of South Africa was submitted to the Governing Body at its 240th Session in May-June 1988.[5]

5. The present is the sixth case in which a government has given its consent to referral to the Fact-Finding and Conciliation Commission.[6]

6. The Republic of South Africa ceased to be a member of the International Labour Organisation on 11 March 1966 and was not a Member at the time the complaint was deposited, on 11 May 1988. Nor is it a member at the time of this report. However, it remained a Member of the United Nations. It was therefore necessary to refer the matter to the Economic and Social Council of the United Nations in accordance with the procedure established between the ILO and the United Nations in regard to complaints against States which are not Members of the ILO but which are members of the United Nations. The Economic and Social Council having requested the Government of the Republic of South Africa to give its consent to the matter being referred to the Fact-Finding and Conciliation Commission of the ILO, this consent was

communicated to the Director-General of the ILO in a letter dated 19 February 1991 from the Minister of Manpower of the Republic of South Africa.

7. The Governing Body designated three members of the Commission to sit on the panel to examine the case. A description of the procedure followed by the Commission, an analysis of the information and evidence placed before it and the Commission's findings, conclusions and recommendations are contained in Chapters 2 to 14 of this report.

8. The essential task of the Commission was to examine the trade union and labour relations situation in South Africa against the established ILO standards and principles in this field. The relevant international labour standards are the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), the Right to Organise and Collective Bargaining Convention, 1949 (No. 98), the Workers' Representatives Convention, 1971 (No. 135), the Rural Workers' Organisations Convention, 1975 (No. 141), and the Labour Relations (Public Service) Convention, 1978 (No. 151).[7] The principles of freedom of association have also been developed by the supervisory bodies of the ILO, and in particular in previous reports of the Fact-Finding and Conciliation Commission on Freedom of Association[8] and in the reports of the Governing Body Committee on Freedom of Association.[9]

9. In submitting this report to the Governing Body the Commission wishes to express its appreciation for their cooperation to the Government of the Republic of South Africa and in particular the Department of Manpower, to the Congress of South African Trade Unions (COSATU) and to counsel for both parties, whose capable and comprehensive presentation of the arguments on both sides greatly facilitated the task of the Commission. The Commission further appreciated the assistance it received from the principal employers' organisations, the South African Consultative Committee on Labour Affairs as well as other organisations and individuals throughout South Africa too numerous to mention by name. The Commission records its special thanks to the Independent Mediation Service of South Africa which provided the premises and other facilities for the Commission's sittings in Johannesburg and made arrangements for the individual visits referred to in paragraphs 62 to 73 below.

Notes

[1] See minutes of the 109th Session of the Governing Body, eighth sitting, p. 84.

[2] See minutes of the 110th Session of the Governing Body, pp. 62-90.

[3] See Official Bulletin, Vol. XLIX, No. 1, Jan. 1966, Special Supplement, Chapter 2, pp. 5-7.

[4] See Fourth Report of the International Labour Organisation to the United Nations (Geneva, ILO, 1950), Appendix VI, pp. 324-326 (procedure for the examination of allegations of infringements of the right to freedom of association established under an agreement between the United Nations and the ILO, as set out in the letter of 19 January 1950 from the Director-General of the ILO to the Secretary-General of the United Nations). Reports by the Committee on Freedom of Association dealing with complaint procedure: First and Third Reports (Sixth Report of the International Labour Organisation to the United Nations (Geneva, ILO, 1952), Appendix V, pp. 169-196 and pp. 225-237); Sixth Report (Seventh Report of the International Labour Organisation to the United Nations (Geneva, ILO, 1953), Appendix V, pp. 229-396); Ninth Report (Eighth Report of the International Labour

Organisation to the United Nations (Geneva, ILO, 1954), Appendix II, pp. 166-173); 19th Report, in Official Bulletin, Vol. XXXIX, 1956, No. 4, pp. 101-142; 29th, 33rd and 43rd Reports (ibid., Vol. XLIII, 1960, No. 3, pp. 77-81, 147-169 and 264-265); 127th Report, Vol. LV, 1972, paras. 9-28.

[5] See GB.240/14/23.

[6] The first case concerned the Government of Japan (see Official Bulletin, Vol. XLIX, No. 1, Jan. 1966, Special Supplement). The second concerned the Government of Greece (see Official Bulletin, Vol. XLIX, No. 3, July 1966, Special Supplement). The third case concerned the Government of Chile (Report of the Fact-Finding and Conciliation Commission concerning the case of Chile, Geneva, 1975). The fourth case concerned the Government of Lesotho (Report of the Fact-Finding and Conciliation Commission concerning the case of Lesotho, Geneva, 1975). The fifth case concerned the Government of the United States of America (Report of the Fact-Finding and Conciliation Commission concerning the case of the United States/Puerto Rico, Geneva, 1981).

[7] The provisions of Conventions Nos. 87, 98 and 141 are analysed in Freedom of Association and Collective Bargaining: General Survey, International Labour Conference, 69th Session, 1983, Report III, Part IVB.

[8] See footnote 6 above.

[9] Freedom of Association: Digest of decisions and principles of the Freedom of Association Committee, 3rd edition, 1985.

CHAPTER 2

REFERRAL OF THE CASE TO THE FACT-FINDING AND CONCILIATION COMMISSION ON FREEDOM OF ASSOCIATION, APPOINTMENT OF A PANEL OF THE COMMISSION TO EXAMINE THE CASE AND FIRST SESSION

(a) Referral to the Commission

10. On 10 March 1966, the period of notice given by the Republic of South Africa on 11 March 1964 of its intention to withdraw from membership of the International Labour Organisation (ILO), expired. The Republic of South Africa remained a member of the United Nations.

11. In its communication dated 11 May 1988, addressed to the Director-General of the ILO, the Congress of South African Trade Unions (COSATU) presented a complaint against the Government of the Republic of South Africa "based on the fundamental curtailment of freedom of association constituted by certain amendments to the Labour Relations Act No. 28 of 1956 proposed by the South African Government, notice of which was given by Government Notice B 118/87(GA), 1987".

12. COSATU alleged that, if passed, the amendments would make fundamental inroads into the freedom of association of trade unions in South Africa. According to COSATU, among the unions which would suffer most keenly would be the affiliates of COSATU which, having membership in excess of 1 million, was the largest federation of trade unions in South Africa. More specifically, COSATU alleged that these amendments would promote racially constituted trade unions at the expense of non-racial ones and that they would abridge the freedom to strike. COSATU requested that appropriate steps be taken to ensure that this complaint be investigated by the ILO or such other body as might, in international law, have competence to entertain the complaint.

13. The Republic of South Africa has not ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), the Right to Organise and Collective Bargaining Convention, 1949 (No. 98), the Workers' Representatives Convention, 1971 (No. 135), the Rural Workers' Organisations Convention, 1975 (No. 141), or the Labour Relations (Public Service) Convention, 1978 (No. 151).

14. The complaint was submitted to the Governing Body at its 240th Session (May-June 1988).[1] In accordance with the procedure outlined in Chapter 1, the Governing Body:

(a) decided to refer to the Economic and Social Council for examination, in accordance with resolution 277(X) of 17 February 1950, the complaint submitted by the Congress of South African Trade Unions against the Republic of South Africa, which is no longer a Member of the ILO;

(b) noted that, under resolution 277(X) of 17 February 1950, it is for the Economic and Social Council to decide what further action it proposes to take in the matter by seeking the consent of the Government of the Republic of South Africa to the referral of the case to the Fact-Finding and Conciliation Commission on Freedom of Association, or in any other manner.

15. The complaint having been thus referred to the Economic and Social Council (ECOSOC), the Secretary-General of the United Nations, in a note dated

21 July 1988, sought the consent of the Government of the Republic of South Africa to having the complaint referred to the Fact-Finding and Conciliation Commission on Freedom of Association. This request was repeated in a note dated 24 January 1989.[2]

16. In a communication dated 14 February 1989, addressed to the Secretary-General of the United Nations, the Government of the Republic of South Africa indicated that it considered that such reference would be premature for the following reasons. The Government said that COSATU was in the process of discussing particular clauses in the Labour Relations Amendment Act, 1988 (hereafter referred to as the LRAA), with employers. The Minister of Manpower had extended an invitation in Parliament to all trade unions and trade union federations to discuss any problems they had with the proposed amendments with him. According to the Government, COSATU had not made use of this opportunity and had accordingly not yet exhausted the internal procedures available to it to settle any differences it may have had regarding the Act. In another communication dated 21 May 1990, the Government once again indicated that it considered that such reference would be premature.[3]

17. However, in a communication dated 19 February 1991, addressed to the Director-General of the ILO, the Government gave its consent to having ECOSOC consider whether the complaint was suitable for referral through the Governing Body of the ILO to the Fact-Finding and Conciliation Commission. In this letter the Minister of Manpower referred to amending legislation passed by Parliament on 14 February 1991 and expressed the opinion that the South African Government fully associated itself with the aim of the Convention concerning freedom of association. This communication was transmitted to the Secretary-General of the United Nations for consideration by ECOSOC at its meeting in May 1991. ECOSOC, noting that the consent of the Government of the Republic of South Africa had been obtained, decided to transmit the complaint to the Commission.[4] In accordance with the procedure outlined in resolution 277(X) the Commission's findings would be transmitted to the Council as soon as possible, in keeping with the Commission's established practice.

(b) Appointment of a panel of the Commission

18. When the Governing Body, at its 111th and 112th Sessions (March and June 1950), appointed the members of the Fact-Finding and Conciliation Commission, it also provided for the possibility of arranging for its work to be done by panels of not less than three nor more than five of its members.[5]

19. At its 250th Session (Geneva, May-June 1991) the Governing Body decided that, having regard to the nature of the case, a panel of three members of the Commission would in all the circumstances be most suitable for the effective discharge of the task that it was proposed to entrust to the Commission, and appointed the following three members of the Fact-Finding and Conciliation Commission to constitute the panel of the Commission to consider the case of the Republic of South Africa:

> Chairman: Sir William Douglas (Barbados), Ambassador; member of the Committee of Experts on the Application of Conventions and Recommendations; former Chief Justice of Barbados; former Chairman, Commonwealth Caribbean Council of Legal Education; former Chairman, Inter-American Juridical Committee; former Judge of the High Court of Jamaica.

Members: Mr. Justice Michael Kirby (Australia), President of the Court of Appeal of New South Wales, former Deputy President of the Australian Conciliation and Arbitration Commission and Chairman of the Australian Law Reform Commission.

Mr. Justice Rajsoomer Lallah (Mauritius), Senior Puisne Judge of the Supreme Court of Mauritius, member and former Chairman of the United Nations Human Rights Committee.

(c) First Session

20. The Commission held its First Session in Geneva on 21-23 October 1991, the purpose of which was to take cognisance of the complaint and to determine the working methods and procedure that it would follow in examining the case before it.

21. At opening the meeting, the Director-General of the International Labour Office, Mr. Michel Hansenne, made a statement emphasising the importance of the task entrusted to the Commission, especially in view of the rapidly evolving situation in South Africa which affected labour relations and South African society. Following this statement, the Director-General called on the members of the Commission to make this declaration, as they did:

> I solemnly declare that I will honourably, faithfully, impartially and conscientiously perform my duties and exercise my powers as a member of the Panel of the Fact-Finding and Conciliation Commission on Freedom of Association appointed by the Governing Body of the International Labour Office, in accordance with the procedure in force for the examination of complaints of alleged infringements of freedom of association, to examine the trade union situation in South Africa following the complaint presented by the Congress of South African Trade Unions against the Government of South Africa on 11 May 1988.

22. The Commission decided to hold its Second Session in South Africa from 7 to 22 February 1992, with sittings in Cape Town (the seat of the Parliament which would be in session at that time) and in Johannesburg for the purpose of hearing the representatives of the parties and witnesses, and individual visits by the three members, accompanied by members of the secretariat, to Durban, East London and Port Elizabeth. The Commission requested COSATU and the Government to designate persons to act as representatives before the Commission, and to be responsible for the general presentation of the case and for representing the respective parties during the hearing of witnesses. The Commission also decided to inform the South African Employers' Consultative Committee on Labour Affairs (SACCOLA), as the most representative employers' organisation, that it would be prepared to grant appropriate facilities for it to be represented during the hearings should a request to this effect be made.

23. The Commission informed COSATU and the Government that it was ready to consider an application from each of them to hear witnesses proposed by them, and requested that the names and descriptions of the witnesses, together in each case with a brief description of the matter on which it was desired that they be heard, should be provided by 15 January 1992, it being understood that it would be for the Commission to decide which witnesses it would hear.

24. The Commission further informed the Government that it would wish to hear evidence from the Minister of Manpower or his representative, the

Industrial Registrar and the Chairman of the National Manpower Commission, and it requested the Government to make preliminary arrangements for their attendance at the Second Session.

25. The Commission requested the Government to make appropriate arrangements to ensure that no obstacles would be placed in the way of the attendance before the Commission of representatives of COSATU or of witnesses whom it may wish to call, and that witnesses enjoyed full protection against any kind of discrimination on account of their attendance and testimony, and also to satisfy itself that such attendance would not be prevented by reason of financial difficulties and that leave of absence would be granted, where necessary, to enable witnesses to appear before the Commission. The Commission itself was provided with a letter, dated 6 February 1992, by virtue of which the Government granted the members of the Commission and its secretariat the privileges and immunities provided for in the Convention on the Privileges and Immunities of the Specialised Agencies in respect of their official duties during its stay in South Africa.

26. The Commission adopted Rules of Procedure for the hearings,[6] which it communicated to COSATU and the Government. It authorised its Chairman to deal on its behalf with any question of procedure that might arise between the sessions.

27. In preparation for its Second Session, the Commission decided to afford COSATU the opportunity to submit to it, by 30 November 1991, any further information which it might wish the Commission to consider, and to afford the Government the opportunity to submit to it, by the same date, any observations on the complaint, and by 15 January 1992 observations on any additional information presented by COSATU. In its letters of 23 October 1991 informing COSATU and the Government of these decisions, the Commission added that it had become aware that, after the complaint had been lodged, significant legislative and other developments had taken place in labour relations in South Africa. It therefore invited them to provide information on relevant developments after the complaint had been lodged and on their impact on the issues raised in the complaint.

28. The Commission also decided to give the principal South African employers' and workers' organisations as well as the international employers' and workers' organisations having consultative status with the ILO the opportunity to submit written statements concerning the complaint by 30 November 1991. A list of these organisations appears as Annex I to this report. The Commission decided that any written information submitted by these organisations would be forwarded to COSATU and the Government so that they might have the opportunity to present comments thereon by 15 January 1992.

29. At the end of the First Session, the Commission met the Permanent Representative of the Republic of South Africa in Geneva and informed him of the decisions taken at the First Session.

(d) Outline of the original case brought before the Commission

30. In its complaint of 11 May 1988, COSATU referred to certain proposed amendments to the Labour Relations Act, 1956 (LRA), which, in its view, sought first to promote racially constituted trade unions and secondly to infringe the freedom to strike.

31. After major amendments were enacted in the LRA in 1981, the provisions relating to trade unions had been non-racial in character. This was true also of the amendments referred to concerning the first issue raised in the complaint, but COSATU argued that they were designed to favour and protect unions open only to Whites.[7]

32. On the issue of freedom to strike, COSATU made four objections. The first referred to provisions which could have the effect of prolonging indefinitely in certain cases the period (designed to allow a settlement to be reached) before a legal strike could take place. The second and third referred to provisions which would make sympathy strikes and intermittent strikes illegal. The fourth objection related to draft amendments to the provision giving registered unions an indemnity against civil proceedings for damages in respect of acts committed in furtherance of a legal strike. Under the amendment, members, officials and office-bearers of a trade union, in the case of an illegal strike, would be liable in delict (tort) for damages suffered by an employer as a result of a strike that constituted a breach of the individual contracts of employment, and such members, officials and office-bearers would be deemed to be acting on behalf of their trade union until the contrary was proved.

33. The draft legislation of which the provisions referred to in the complaint formed part was enacted in the LRAA, which came into force on 1 September 1988. As will emerge below, not all of the provisions objected to were carried over into the Act in the form described in the complaint. However, the majority were enacted unchanged.

34. Important developments took place in the period immediately after the entry into force of the 1988 amendments. ECOSOC was informed of them by the Government. When initially requested to give its consent to the referral of the complaint to the Commission, the Government replied that such reference would be premature, given the discussions which were going on concerning further amendments to the LRA. These discussions, which involved COSATU, SACCOLA and the National Council of Trade Unions (NACTU) resulted in an agreement calling for changes to the amended Act (the CNS Accord) which was signed in May 1990. In September 1990 these organisations reached agreement with the Minister of Manpower (the Laboria Minute, the full text of which appears as Annex II) on the amendment of the LRA. This agreement was published in the Government Gazette in draft Bill form. This Bill was passed by Parliament on 14 February 1991 and came into force on 1 May 1991.

35. In his letter of 19 February 1991 to the Director-General of the ILO, giving his Government's consent to the referral of the complaint to the Commission, the Minister of Manpower referred to "a tripartite accord between the State, employers and trade unions". He informed the Director-General that this Laboria Minute had been translated into legislation and passed by Parliament on 14 February 1991. He added that he was of the opinion that this legislation - copies of which were supplied - addressed the matters raised by COSATU.

36. The issues raised in the COSATU complaint submitted on 11 May 1988 were addressed by the 1991 amendments to the LRA. COSATU had submitted that one of the purposes of the 1988 Act was to protect and promote the interests of racially exclusive unions. It was referring in this respect to section 4(4)(c). It contended that this, although neutral in terms, was racist in effect in that, in the case of registration of trade unions, its purpose was to enable the Industrial Registrar, in deciding whether to register a union whose constitution limited its membership to Whites, to reject an objection from an already registered union if it did not represent the majority of Whites in the industry concerned, notwithstanding that it was overwhelmingly

representative of workers in the industry as a whole. The 1991 Amendment Act repealed section 4(4)(c) with the result that an organisation could thereafter be registered in respect of those areas and interests where it could show that it is sufficiently representative. In terms of infringements of the freedom to strike, COSATU stated that the 1988 Act prohibited sympathy strikes and intermittent strikes by defining them as "unfair labour practices" in section 1(1)(l) and (m). The 1991 Act replaced this definition of "unfair labour practice" with one similar to that in force prior to the 1988 amendments, with the result that sympathy strikes and intermittent strikes are no longer illegal. Moreover, section 79 of the 1988 Act, which entitled employers to secure an interdict (injunction) against a strike which constituted a breach of the individual employment contract and claim damages for the loss suffered by the employer in consequence of such breach, was also amended by the 1991 Act. The result of this amendment was that strikes which are preceded by the conciliation procedures laid down in the Act may no longer be the subject of an interdict. The presumption of union liability for illegal strike action by its members was repealed by the 1991 Amendment Act.

(e) Further submissions from the parties on the Commission's terms of reference

37. COSATU submitted further information on the case, in response to the Commission's invitation, of 3 December 1991. The submissions included further detail on the original complaint, as well as considerable information on other labour matters which, according to COSATU, the Government "has allowed the Commission to entertain". COSATU referred particularly on this latter point to a meeting between the then Minister of Manpower and the Director-General of the ILO. According to COSATU, at that meeting the Minister agreed to the Commission having open terms of reference to investigate, hear evidence and report on matters pertaining to labour relations.

38. On 18 December 1991 the Government objected to the ILO concerning COSATU's interpretation of the extended mandate of the Commission. It pointed out that, at the Minister's meeting with the Director-General, the Minister had indicated that he had no objection if the Commission also deliberated with interested parties on the manpower scene concerning labour matters in general during its visit to South Africa. This was on the clear understanding that the Government would not be put on trial and that the emphasis would be placed purely on deliberation. The Government stated that the Cabinet subsequently approved that the mandate of the Commission be extended as indicated. Cabinet also agreed that the Commission be permitted to bring out a separate report on these deliberations and publish it, subject to the condition that the Government would have the right to see the report beforehand as well as the right to comment on it. The Government thus saw the extended mandate as consisting of two separate issues, namely an investigation into the initial complaint by COSATU to which the Government had consented; and deliberations with interested parties on labour matters in general, subject to the conditions set out above. The Government indicated that because COSATU had gone beyond the mandate of the Commission in compiling its submissions, it would not be able to comment on COSATU's further document before clarification on the mandate had been received from the ILO. As this implied that 15 January 1992 would not be an attainable date within which to respond, the Government added that the proposed visit by the Commission scheduled for February 1992 might not be opportune.

39. On 23 December 1991 the Director-General of the ILO replied to the Government after consulting the Chairman of the Commission. He emphasised

that the Commission functioned as an impartial fact-finding body and that its role was not to condemn or pronounce judgement but rather, on the basis of the established facts, to make recommendations for future action based on ILO principles and standards. On the question of the extension of the mandate, the Director-General pointed out that the initial mandate was conferred on the Commission by the ILO Governing Body on the basis of the complaint and the letter of the Minister of Manpower dated 19 February 1991, and any extension of that mandate was a matter to be decided between the parties and the Commission itself. He added that the Chairman had informed him that, at its First Session, the Commission decided that it would be prepared to examine further issues if the parties agreed to a widening of its mandate. Since, however, it appeared from the submissions of COSATU and the Government's letter that no agreement had been reached so far on the precise scope of the term "labour matters in general" on which it was agreed the Commission could deliberate in addition to the original complaint, the Director-General expressed the hope that the Commission would be able to proceed with its visit to South Africa as planned and that the precise scope of the terms of reference could, if necessary, be finally settled at the initial meetings of the Commission in the country. The Government was encouraged to send its responses and given additional time to prepare them.

40. On 14 January 1992 the Government transmitted its observations, pointing out that since there was no agreement on the precise scope of the terms of reference, it would restrict itself to commenting on the COSATU complaint of 11 May 1988.

41. On 22 January 1992 COSATU enlarged upon its understanding of the extension of the Commission's mandate to include at least the power to deliberate and report on labour matters in general.

42. In an undated communication, received on 21 January 1992 and two further letters of 21 and 24 January 1992, the Government elaborated its views concerning the mandate and again contested COSATU's description of the agreement on revised terms of reference.

43. On 7 February 1992, at the formal opening meeting of the Commission's Second Session in Cape Town, the parties submitted to it a copy of their agreement, signed on 7 February 1992, on revised terms of reference which read as follows:

> To deliberate on and consider the present situation in South Africa insofar as it relates to labour matters with particular emphasis on freedom of association.

44. The Commission immediately invited those national workers' and employers' organisations listed in Annex I to submit any further comment they might have in view of the revised terms of reference. In addition, the Commission informed the Director-General of the parties' agreement in a letter dated 14 February 1992.

(f) Observations to the Commission from invited organisations

45. Of the 14 national workers' and employers' bodies and six international organisations invited to make comments on the original complaint, the following sent written observations: (1) SACCOLA, on 29 November 1991, on behalf of those of its members excluding the South African Agricultural Union (SAAU) invited individually by the Commission and reserving

their rights to be separately represented at, and to make separate additional submissions, before the Commission at its Second Session; (2) the International Confederation of Free Trade Unions (ICFTU), on 29 November 1991, enclosing comments from the International Federation of Plantation, Agricultural and Allied Workers' Unions (IFPAAW) specifically on the exclusion of farmworkers from the LRA; and (3) the International Organisation of Employers (IOE), on 10 December 1991. In addition, the South African Council of Business (SACOB) (on 18 November 1991), the Steel and Engineering Industries Federation of South Africa (SEIFSA) (on 19 November 1991) noted that they supported SACCOLA's submissions on the case.

46. All these written comments referred to the fact that the original complaint had been overtaken by events, in particular by the 1991 Amendment Act and tripartite discussions reflected in the Laboria Minute.[8] In this Minute, it was agreed to review, as a matter of priority, the position of agricultural, domestic and public sector workers still excluded from the LRA. The ICFTU added its concerns over the situation of workers in the bantustans (homelands),[9] currently excluded from the South African legislation, over delays in implementing aspects of the Laboria Minute and over the violence surrounding the exercise of trade union rights. It called for one single piece of comprehensive labour legislation covering all sectors of the workforce throughout South Africa.

Notes

[1] GB.240/14/23, approved by the Governing Body at its 240th (May-June 1988) Session.

[2] For the description of the procedures reported to the Economic and Social Council, see the Note by the Secretary-General of the United Nations in document E/1989/49 of 7 April 1989.

[3] This is reflected in the following ECOSOC documents: (1) resolution on infringements of trade union rights in South Africa, E/1989/C.2/L.20 of 18 May 1989; (2) resolution on infringements of trade union rights, E/1990/70/Add.1 of 25 May 1990; and (3) documents from the South African Government circulated under reference E/1990/87 and E/1990/87/Add.2 of May 1990.

[4] Note by the Secretary-General, E/1991/57 of 23 April 1991, and resolution on infringements of trade union rights in South Africa, E/1991/C.2/L.16 of 22 May 1991.

[5] See First Report of the Committee on Freedom of Association, para. 12.

[6]

1. The Commission will hear all witnesses in private sittings and the information and evidence presented to the Commission therein is to be treated as fully confidential by all persons whom the Commission permits to be present.

2. The Government of South Africa and the Congress of South African Trade Unions will be requested to designate representatives to act on their behalf before the Commission. The representatives will be expected to be present throughout the hearing of witnesses.

3. Except with the leave of the Commission witnesses may not be present except when giving evidence.

4. The Commission reserves the right to consult the representatives in the course of or upon the completion of the hearings in respect of any matter on which it considers their special cooperation to be necessary.

5. The function of the Commission is to ascertain facts which are relevant to its inquiry into the issues which have been referred to it by the Governing Body of the International Labour Office. The opportunity to furnish evidence is given for the purpose of supplying factual information bearing on the case before the Commission. The Commission will give witnesses all reasonable latitude to furnish such information, but it will not permit statements relating to matters not relevant to the issues referred to it.

6. The Commission will require each witness to make a solemn declaration identical to that provided for in the Rules of Court of the International Court of Justice. The declaration reads: "I solemnly declare upon my honour and conscience that I will speak the truth, the whole truth and nothing but the truth."

7. Each witness will be given an opportunity to make a statement before questions are put to him. If a witness reads a statement, the Commission will appreciate six copies being supplied in English.

8. The Commission or any member of the Commission may put questions to witnesses at any stage.

9. With the leave of the Commission, the representatives present in accordance with the rules laid down in paragraph 2 above will be permitted to put questions to the witness, in an order to be determined by the Commission.

10. All statements by witnesses and questioning of witnesses will be subject to control by the Commission. The Chairman will not allow statements to be made or questions to be put or answered which in the opinion of the Commission are outside the terms of reference of the Commission.

11. Any failure on the part of a witness to reply satisfactorily to a question put will be noted by the Commission.

12. The Commission reserves the right to recall witnesses, if necessary.

[7] For a description of the nomenclature of the various racial groups in South Africa, see Chapter 5, para. 105.

[8] See Annex II.

[9] For an explanation of this term, see Chapters 5 and 12(b).

PART II: Further proceedings of the Commission

CHAPTER 3

SECOND SESSION - VISIT TO SOUTH AFRICA

47. The Commission's Second Session took place in South Africa from 7 to 22 February 1992.

48. In accordance with the decision taken at its First Session, the Commission commenced its work in Cape Town, separated for individual visits from 11 to 13 February, reconvened in Johannesburg on 14 February for hearings of witnesses until 20 February, and concluded with the final arguments of the representatives of the parties on Friday, 21 February 1992. The Commission's programme appears in Annex III to this report.

49. During its stay in South Africa, the Commission met the Minister of Manpower, the Hon. Pieter Marais, MP, the Deputy Minister of Foreign Affairs, the Hon. R. Schoeman, MP, the Hon. Chief Justice, Mr. Justice Corbett, the Hon. Mr. Justice Goldstone and several other Supreme Court Judges, Deputy President Adv. Bulbulia and other members of the Industrial Court and Mr. Nelson Mandela, President of the African National Congress.

(a) Opening meeting

50. The Commission opened its Second Session in Cape Town on Friday, 7 February 1992, at which the Chairman made a statement recalling the dual purpose of Commissions of this kind, namely fact-finding and conciliation, the background to the referral of the complaint to the Commission and the exchanges of correspondence concerning the terms of reference. He proposed that the proceedings begin by hearing the parties on matters relating to the mandate, as a preliminary issue.

51. He also welcomed the representatives of COSATU on the one hand: Professor M. Brassey, Advocate and Mr. G. Marcus, Advocate, as well as Mr. H. Cheadle, Ms. H. Seady, Ms. S. Saley and Mr. R. Khumalo of the law firm Cheadle, Thompson and Haysom, and of the Government on the other hand: Mr. P. Blieden, Senior Advocate and Mr. H. Haycock, Advocate, as well as Mr. D. Burger and Mr. H. van Ieperen of the State Attorney's Office, and Mr. E. Fourie, the Director-General of the Department of Manpower, and Mr. D. Moody of that Department.

52. The Chairman announced the presence of Professor P. Le Roux and Mr. A. van Nierkerk, representatives of the South African Employers' Consultative Committee on Labour Affairs (SACCOLA), the most representative employers' organisation in South Africa, which had asked to attend holding a watching brief. The Chairman recalled that SACCOLA had been invited to be represented at the Commission's hearings in accordance with the established practice of the Commission and the fundamental ILO principle of tripartism.

53. As noted in the preceding chapter, the representatives of the parties proceeded to hand in to the Commission a copy of the minutes of a meeting between the parties signed on 7 February 1992 and containing their agreement on revised terms of reference. It was on the basis of this agreement that the Commission decided to continue its proceedings.

54. At the outset, the representatives of COSATU made a formal request that the proceedings of the Second Session be held in public. They argued this on the grounds of the educative function of the Commission's work and the importance of all parties being able to come forward if they believed they had something to add to its inquiries. They stated that it was important to allay the suspicions that would surround any procedure held behind closed doors, and differentiated the practice of the Commission in the past cases where hearings had taken place in a hostile environment. They felt that if any particular witness wished to be heard in private, the Commission could accede on a case-by-case basis. The Government's representatives stated that it would have great difficulty in taking part or remaining present if evidence were to be given in public. Referring to the climate of violence in the country and the risk of intimidation of witnesses, and recalling that the Commission's report would be rendered public, the Government stressed that the rule of confidentiality of hearings, used by past panels of the Commission, should be respected, especially where the Commission's conciliation role was involved. The Commission ruled that it would follow the procedure set out in Rule 1 of its "Rules of Procedure for the hearings", adopted at its First Session, and as used in earlier cases, namely that it would hear all witnesses in private sittings unless the parties consented to waive this rule, which was not the case here.

55. This exchange of views on the confidentiality of the proceedings led the Government's representatives to request that it be recorded that the parties, in their joint minute signed on 7 February 1992, had agreed that the Government would receive a copy of the Commission's report on a confidential basis, so as to allow it an opportunity to consider it and make comment prior to both being tabled in the ILO Governing Body. COSATU's representatives had no objection to this. The Commission acceded to the parties' understanding. It also pointed out that the Government had already received assurances following the First Session that, in accordance with past practice, a copy of the final report once signed and sent for translation would be made available to the parties for the preparation of any comment which they might wish to have circulated within the Governing Body at the same time as the report itself.

(b) Preliminary statements by the representatives of the parties

56. The parties agreed that COSATU's representatives should open the presentation of argument. The first point made by COSATU was that the basis of its complaint had not fallen away with the 1991 amendments to the 1988 legislation. It argued that the two issues of registration of racially based unions and impairment of the right to strike did not disappear with the changes made to the 1988 Bill during its passage, nor with the 1991 amendments. It claimed that the Government had recognised the ongoing validity of its complaint by consenting to its referral to the Commission on 19 February, five days after the repeal of the 1988 amendments. Secondly, it described the ILO standards on freedom of association, against which the allegations were made. (Extracts of the principal ILO instruments appear in Annex VIII to this report.) Thirdly, it pointed to the shortcomings in South African labour law and practice vis-à-vis these standards. Referring to the Government's written response to COSATU's further submissions, COSATU challenged the Government's view that freedom of association was a worker/employer matter in which the Government was not implicated and its statement that various specific allegations were presently the subject-matter of debate at the deliberations of the Convention on a Democratic South Africa (CODESA) and thus made it inappropriate for the Government to comment on them

at this juncture. The CODESA Declaration of Intent, as well as the agreed terms of reference of its five working groups, appear as Annex VII to this report. Fifthly, COSATU stressed the important influence the social climate of an apartheid South Africa had on labour matters, given that most workers were black. The exclusion of the black population from the formal political process had resulted in a society in which labour had been repressed, and the effect had been to tilt the balance in favour of the employers and against the workers by legal means. This meant that what might be legitimate in a democratic country could not necessarily be assumed to be legitimate in South Africa. Thus certain discretionary powers vested in a government official - for example, in relation to the registration of trade unions - may be inoffensive in a democratic society where their exercise would be responsive to the democratic process, but this could not be assumed in a society such as South Africa. Again, it might be legitimate in some countries to place restrictions on the political activities of trade unions because other processes were available to their members for the ventilation of political aspirations; it was put to the Commission that this was not the case in South Africa. Sixthly, it was pointed out that the prevailing legal system - where the common law applied in the absence of statutory regulation - and the LRA itself had not protected workers who suffered infringements of their trade union rights. There were also weaknesses in the policy-setting institutions such as the National Manpower Commission. COSATU doubted that the transition to democratic rule would mean that the structural imbalances would be redressed immediately. The Commission should therefore assume that the situation as it was found was likely to endure for a long time.

57. COSATU summarised the central issues as follows:

- excessive legislative incursion into trade union rights to participate in political activities;
- excessive executive power to intervene in trade union rights and collective bargaining;
- use of State power to advance or impede the progress of certain unions;
- inadequate regulation of collective bargaining; and
- unsatisfactory regulation of strikes.

58. The Government's initial reply of 14 January was supplemented by a written response to COSATU's further submissions. This was submitted to the Commission at the opening meeting of its Second Session and enlarged upon by its representatives when the meeting resumed in Johannesburg on 14 February 1992. According to the Government, given the great changes already under way in the country, including the CODESA deliberations and the Government's own legislative programme following the Laboria Minute, it would be incorrect for it to adopt any position on the issues before the Commission at this stage. The Government recalled that the revised mandate of the Commission was to examine "the present situation", and not what had happened in the past. South Africa was in the process of undergoing tremendous changes, which had become more marked since the State President's address at the opening of Parliament on 2 February 1990, which had led to the unbanning of political parties, the freeing of political prisoners, including trade unionists, and a series of legislative enactments. For this reason, in answering the various points raised by COSATU, the Government had concentrated on the situation after that date, which reflected "the present realities". For the same reason, the Government had not addressed the criticisms levelled by COSATU against various legislative enactments which were to a large extent outdated: it did not perceive the Commission's function as being to investigate outdated, and in

some cases irrelevant, legislation which was no longer being used, but the present situation as it now existed. It announced that its witnesses would deal with labour relations as they existed in South Africa at that time, the evolution of the LRA, the peculiar problems which faced South African society and the scope of the current CODESA deliberations.

59. The Government emphasised that the elaboration of a new LRA was under way, in accordance with the Laboria Minute,[1] and might be passed within 18 months. It intended to consult the major actors in the labour relations arena before enacting this legislation. Given that the parties would be involved in this reformulation, the Government suggested that the Commission, or a similar body, would serve a better purpose by visiting the country at a later date, when comments could be made on the new legislation. It pointed to the 1991 amendments as an example of the success of its approach of letting employers and workers move forward at their own pace and arrive at joint decisions. The Government drew attention to the special circumstances applying in South Africa, whose characteristics included elements of a first and third world country. There were thus two very different types of trade unions: some were composed mainly of unskilled or semi-skilled workers, who could be used or intimidated for political ends. Their employment was often at risk, whether as a result of automation or because if dismissed they could easily be replaced from the vast reservoir of unemployed workers. Secondly, there were trade unions of highly skilled workers who could not be easily replaced if they were dismissed. Any new legislation had to take account of the specific circumstances of the country, and it was important not to oversimplify the reality. The interaction between economic issues and the labour market would be of critical importance in a country with huge unemployment, serious skill shortages and low productivity. The scale of the unemployment problem was of cardinal importance. There were between 5 and 6 million people unemployed in South Africa (excluding the homelands) who constituted about 40 per cent of the potential labour force. The problem was intensified by a move towards capital-intensive and away from labour-intensive investment.

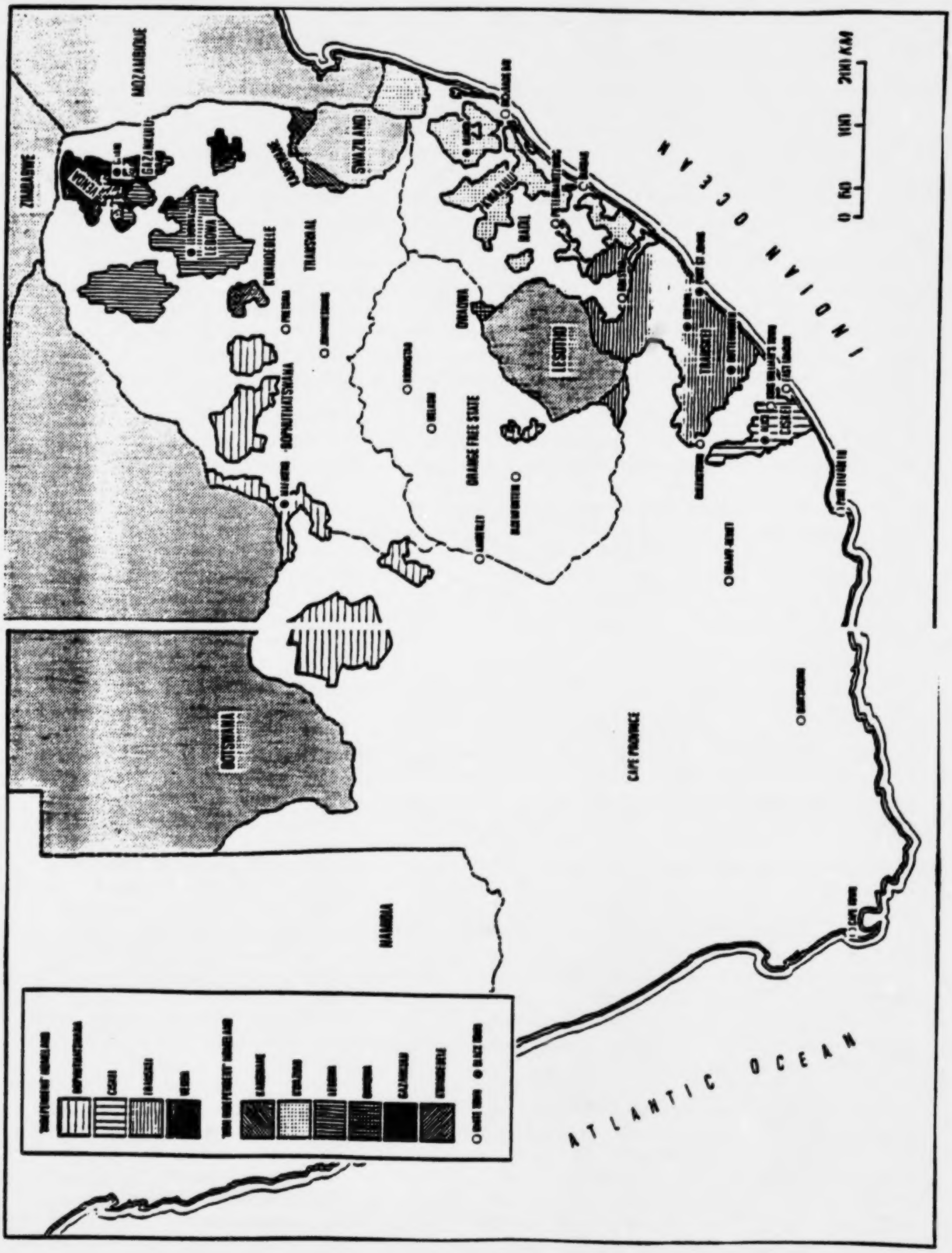
60. The COSATU representatives immediately rejected this argument, which they characterised as: "the past is irrelevant, the present premature and the future to be left to the parties". For COSATU, the Commission's visit came at a highly opportune time for changes in the country, and any contribution it might make to assessing South African legislation and legal structures to ensure that they conformed with international standards on freedom of association would be beneficial.

61. In reply to questions on the scope and timetable of CODESA's deliberations, the Government's representative indicated that CODESA would not be receiving government submissions on labour relations; it would, however, be considering much of the legislation criticised in the COSATU complaint as having a negative impact on trade unions.

(c) Individual visits

62. After its opening meeting and the presentation by the parties of their respective preliminary statements, the members of the Commission, each accompanied by a member of the Secretariat, undertook individual visits to urban and rural centres to the south and east of the country (see map). During these visits, the members received a large amount of general documentation in the form of brochures, charts, statistics and books.

South Africa and the "homelands" (bantustans)


ZIMBABWE
MOZAMBIQUE
SWAZILAND
VENDA
GAZANKULU
LEBOWA
KWANDEBELE
TRANSVAAL
BOPHUTHATSWANA
KWAZULU
NATAL
QWAQWA
LESOTHO
ORANGE FREE STATE
TRANSKEI
CISKEI
CAPE PROVINCE
BOTSWANA
NAMIBIA
INDIAN OCEAN
ATLANTIC OCEAN
0 50 100 150 KM

63. Sir William Douglas visited East London, the principal city in a part of the Eastern Cape known as the Border Region because it formed a corridor bordered on each side by the Ciskei and Transkei, territories considered by the South African Government to be independent States. Most of the workforce of the enterprises in East London lived in the Ciskei and travelled daily distances of up to 50 kilometres to and from work.

64. During his stay in East London, Sir William Douglas met representatives of the National Union of Metalworkers of South Africa (NUMSA), a COSATU affiliate and the principal trade union active in the area. He also held discussions with members of the executive committee of the Border Business Action Committee, a body bringing together businesses operating in the Border Region as well as in Ciskei and Transkei. Representatives of businesses in all three areas were present at the meeting.

65. Sir William Douglas visited three factories in East London. At Mercedes Benz South Africa, which had a recognition agreement with NUMSA, he met representatives of management and the shop stewards' committee. The second factory visited, Tek Industries, had three factories in East London, one of which had a union recognition agreement whereas in the others negotiations were conducted through a workers'/management forum, the workers' representatives being elected by the workforce. At the third factory, Langeberg Food Corporation, a recognition agreement had been concluded with an independent trade union, the National Union of Food Workers, which was not affiliated to any of the national federations.

66. Sir William Douglas had further meetings with the Director of the local Department of Manpower, with representatives of the Border Dispute Resolution Committee set up under the Peace Accord and with Professor Bengu, Principal and Vice-Chancellor of Fort Hare University at Alice in the Ciskei. Finally, he visited Mdantsane, the Black township in the Ciskei which was home to most of the workers in East London.

67. During his stay in Durban, Justice Lallah met with the Natal Regional Director of the Department of Manpower and two members of his staff, seven representatives of companies, members of the Natal Chamber of Industries, and five workers' representatives from COSATU, the National Mineworkers' Union (NUM), and the National Education, Health and Allied Workers' Union (NEHAWU), both COSATU affiliates. In addition, a discussion session was held with 17 lawyers who represented both unions and employers and panelists of the Independent Mediation Service of South Africa, and a call was paid on Justices Didcott and McCall of the Supreme Court (Natal Provincial Division), the latter of whom was sitting as a judge of the Labour Appeal Court.

68. Justice Lallah's visit commenced with a tour of a Black squatter settlement to the north of Durban, driving and walking through shack, "matchbox", wattle-and-daub and hostel accommodation in KwaMashu, Inanda, Bambayi and Phoenix Settlement. In some areas houses had been abandoned due to local violence. He was able to see the informal stall shops, the Thembalabantu Creche and a shebeen (illicit bar), and assess the water and transport facilities.

69. After talks with COSATU and NEHAWU members, Justice Lallah was driven up the Natal coast through cane fields and past forest and a South African Pulp and Paper Industry (SAPPI) factory to Esithebe in the self-governing territory of KwaZulu. There he toured an industrial park administered by the KwaZulu Finance and Investment Corporation (KFC). Various light manufacturing plants there had recognition agreements with COSATU

affiliates despite the fact that the KFC had refused to let office space to the unions.

70. Justice Kirby visited Port Elizabeth, a heavily industrialised town in the Eastern Cape where the metal, auto and tyre sectors were prominent and where most workers were organised by NUMSA. He also visited a Black squatter settlement to the north of the town.

71. During his stay in Port Elizabeth, Justice Kirby met the President of COSATU, Mr. John Gomomo, who was also a representative of NUMSA. Discussions were held simultaneously with other representatives of NUMSA. Justice Kirby held separate meetings with representatives of companies, including Volkswagen of South Africa, Cadbury (Pty) Ltd and Delta Motor Corporation, which were members of the Midland Chamber of Industries.

72. A call was paid on Bishop Evans of the Anglican Church of the Province of South Africa and Bishop Coleman of the Roman Catholic Church. Both churches are active in the field of industrial relations in Port Elizabeth. Justice Kirby met Justices Melunsky and Nepgen of the Supreme Court (Cape Provincial Division). He also met Mr. R. Riorden, Director of the Human Rights Trust, and Mr. Fikile Bam, an experienced labour mediator, together with representatives of the legal and industrial relations communities.

73. Further meetings were held with the Director and Deputy-Director of the Industrial Relations Unit of the University of Port Elizabeth. The Unit focuses on two major areas of work. Its academic programme and community services extend across a broad range of educational, training, information and advisory services. It also provides third-party assistance in dispute resolution. Finally, Justice Kirby held a meeting at the Midland Chamber of Industries with employers of the tyre industry and with representatives of NUMSA to discuss certain aspects of the "progressive agreement" reached by them which covered issues such as job security and job creation, education and training, annual bonus, night-shift allowance, moratorium on retrenchments, compassionate and maternity leave.

(d) Witnesses

74. Eleven sittings for the hearing of witnesses were held, in the presence of the above-named representatives of COSATU and of the Government. A full list of the witnesses who appeared before the Commission is set out in Annex IV to this report.

75. COSATU called the following 11 witnesses to give oral evidence of an expert or factual nature: Mr. Jay Naidoo, General Secretary, COSATU; Professor C.J.R. Dugard, University of the Witwatersrand; Professor E. Webster, University of the Witwatersrand; Mr. M. Madlala, Assistant General Secretary, Food and Allied Workers' Union (FAWU); Mr. P. Dladla, organiser, NUMSA; Mr. E. Patel, Assistant General Secretary, South African Clothing and Textile Workers' Union (SACTWU); Mr. C. Ramaphosa, Secretary-General, African National Congress (ANC) former Secretary-General, National Union of Mineworkers (NUM); Mr. M.J. Golding, Assistant General Secretary, NUM; Ms. Violet Motlhasedi, South African Domestic Workers' Union (SADWU); Mr. C.H.J. van Rensburg, Deputy General Manager, Public Service Association of South Africa (PSA), not affiliated to COSATU; and Mr. C. Ngcukana, General Secretary, National Council of Trade Unions (NACTU), not affiliated to COSATU. Ten of these witnesses also provided written statements to accompany

their oral presentation, and the remaining witness handed in documentation (in the form of copies of correspondence) in support of his assertions.

76. The Government of South Africa presented the following three witnesses, also to give expert or factual evidence: Mr. Z.J. de Beer, leader of the Democratic Party, Chairman of CODESA; Professor N.E. Wiehahn; and Major-General C.M. van Niekerk, Commanding Officer, administrative services, South African Police. Two of these witnesses tendered written statements to accompany their oral evidence. Although present during most of the sittings and referred to in evidence, the Director-General of the Department of Manpower was not called as a witness by the Government.

77. The Commission, in accordance with the decision taken at its First Session,[2] itself called evidence from the following three persons: Mr. D. van der Walt, Director, Labour Relations, Department of Manpower; Mr. D.W. James, the Industrial Registrar; and Dr. F.S. Barker, Chairman, National Manpower Commission (NMC). The evidence of the latter was supplemented by that of Professor A.A. Landman, member, NMC. All four provided written statements to accompany their oral evidence. The Commission had prepared, and transmitted in advance of their appearance, specific questions on which it wished to receive further information.

78. Moreover, by letter dated 14 February 1992, COSATU requested the Commission to call further witnesses to give evidence on certain matters that surfaced in the evidence of witnesses already heard. Regarding the first request relating to the Government of Bophuthatswana, the Commission orally informed the parties that the Ministry of Foreign Affairs of the Republic of South Africa had on 13 February 1992 made contact with the Secretariat of the Commission and had been asked to inquire whether Bophuthatswana would be willing to send a representative in order to provide the Commission with information concerning labour legislation and labour relations applying in Bophuthatswana. No response was received to this invitation.

79. The second request related to the United Workers' Union of South Africa (UWUSA), an organisation specifically referred to in COSATU's further submissions. It should be recalled that UWUSA had been invited by the Commission to submit comments at the time that requests were addressed to a variety of organisations in October 1991. No reply had been received. After contact had been made in South Africa, UWUSA sent Mr. D.R. Senagomo, National Public Relations Officer, to respond to the Commission's questions. The UWUSA representative announced the sending of a statement in writing and deferred replying to questions of a factual nature put to him pending preparation of this document. No such document arrived while the Commission was visiting South Africa. The Commission decided to allow UWUSA four days from the end of the hearings of witnesses in which to transmit the statement, and addresses and facsimile numbers were provided to assist it in meeting this deadline. Nothing was subsequently received from UWUSA.

80. The Commission, during the course of the Second Session and in accordance with the decision taken at its First Session,[3] granted a request from SACCOLA to adduce evidence through certain witnesses. Accordingly, Mr. J.W. Botha, Chairman of SACCOLA, representative of the South African Chamber of Business, and Mr. R.M. Godsell, responsible for labour legislation in SACCOLA, director of Anglo-American Corporation, gave presentations supported by a written document. In addition, Mr. J.J. Kleynhans, South African Agricultural Union (SAAU), had requested, through the SACCOLA watching brief, to be present during the hearing of a COSATU witness who was to give factual evidence concerning working conditions of farmworkers and the impact on them of the absence of protective legislation. The Commission acceded to this request and allowed the SAAU representative to put questions through the

Chairman to the COSATU witness. Mr. Kleynhans himself gave oral evidence, supported by a written statement, on the situation of farmworkers in South Africa.

(e) The role of employers' organisations

81. At this point it is useful to explain in detail the role of the employers' organisations in the Commission's Second Session proceedings.

82. SACCOLA, as the most representative employers' organisation - as well as the other principal employers' organisations - was invited by the Commission to comment on the complaint. This invitation related to the original complaint of 11 May 1988 and SACCOLA's written observations of 29 November 1991 clearly related only to the two issues of registration of racially oriented unions and the right to strike which, it claimed, had been resolved by the 1991 legislative amendments. As already noted, agreement on the revised terms of reference was notified to the Commission only at the formal opening of its Second Session. It was not therefore until then that SACCOLA and the other employers' organisations received copies through the Commission of COSATU's further submissions, raising a large number of new issues in considerable detail, and of the Government's reply thereto. In SACCOLA's above-mentioned written statement reflecting its reaction to this additional material, it observed that allegations were likely to be made against specific employer bodies or companies, and that it had received the additional submissions only five working days before the witness hearings were to begin. It thus expressed its reservations about the hearing of evidence of this nature.

83. It nevertheless placed the following points before the Commission for its consideration: (1) SACCOLA was committed to the development of labour law in South Africa which was broadly compatible with international standards, enjoyed the confidence of the key players, and which promoted economic growth and the creation of jobs; (2) in SACCOLA's view, a view borne out by the experience of the SACCOLA, COSATU and NACTU negotiations on the 1988 Labour Relations Amendment Act (LRAA), this was best achieved by a process of tripartite debate in an appropriate domestic forum; (3) SACCOLA was therefore concerned that the dispute surrounding COSATU's withdrawal from the NMC be resolved as a matter of urgency and that the NMC resumed the task of dealing with existing disputes and any new disputes concerning labour law; (4) it was axiomatic that once this process was under way, it would lay the basis for the development of a less adversarial and more cooperative system of industrial relations in South Africa. The development of such a system in a market economy would, in SACCOLA's view, facilitate the emergence of a legislative regime which would best promote economic growth and create employment, to the benefit of all South Africans. Lastly, it noted that SACCOLA believed that both the Commission in particular, and the ILO in general, could make a valuable contribution to the development of good labour legislation, particularly in so far as they were able to assist in a determination of the extent to which international norms found expression in South African legislation.

84. In evidence, one of the witnesses for SACCOLA expressed regret that it had not been able to make a more substantive contribution. The list of witnesses had led SACCOLA to consider whether it should enter into a detailed refutation of the incidents described, but this did not correspond to its view of the role of the Commission, which it perceived to be one of conciliation. Subsequently, by the leave of the Commission and without objection by the

Government or COSATU, SACCOLA transmitted a detailed written submission. This was taken into consideration by the Commission.

(f) The conduct of the hearings of the witnesses

85. Before witnesses were heard, the Chairman made available to them the following statement, asked them if they understood and agreed with it, and requested them to make the solemn declaration set out therein:

> Before you give your evidence to the Commission, I wish to indicate the framework within which that evidence is being heard. The Commission was appointed by the Governing Body of the International Labour Office to examine issues originally raised in a complaint presented in accordance with the procedure in force for dealing with complaints against governments which are Members of the United Nations, but not of the ILO, by the Congress of South African Trade Unions, and following receipt of the Government's consent to a panel of the FFCC. Having regard to the allegations made in that complaint, the Commission's task is to examine whether, contrary to the principles of freedom of association, the provisions of the Labour Relations Amendment Bill - subsequently enacted in an amended form - give rise to a fundamental curtailment of freedom of association by giving preference to racially constituted unions and by abridging the right to strike. Subsequently, the parties reached agreement on the mandate of the Commission being extended so that the Commission could deliberate on and consider the present situation in South Africa in so far as it relates to labour matters with particular emphasis on freedom of association.
>
> The present hearings of witnesses constitute part of the arrangements made by the Commission with a view to obtaining full and objective information on the questions at issue. The Commission will give witnesses all reasonable latitude to furnish such information but it will not permit statements which are of a purely political nature not relevant to the issues referred to it.
>
> The Commission requires you to make a solemn declaration, identical to that provided for in the Rules of Court of the International Court of Justice, by which you solemnly declare upon your honour and conscience that you will speak the truth, the whole truth and nothing but the truth. Will you please make this declaration?
>
>> "I SOLEMNLY DECLARE UPON MY HONOUR AND CONSCIENCE
>> THAT I WILL SPEAK THE TRUTH, THE WHOLE TRUTH AND
>> NOTHING BUT THE TRUTH."

86. The parties' representatives were afforded the opportunity of questioning each witness in accordance with the "Rules of Procedure for the hearings" agreed upon by the Commission at its First Session. On occasion, the parties' representatives would refer to the witnesses' written testimony or tender to the Commission documentation in support or rebuttal of various assertions. A full list of documentation submitted to the Commission appears in Annex V to this report.

(g) Closing submissions by the parties

87. All the witnesses having been heard, the representatives of the parties to the case made final statements about the issues and the evidence adduced, supported on both sides by written "heads of argument".

88. The representatives of COSATU recalled the functions of Fact-Finding and Conciliation Commissions, and the revised terms of reference in the present case as support for its contention that the Commission had to assess the South African industrial relations law and practice by reference to the principles of freedom of association. They summarised the evidence on the various central issues pinpointed in COSATU's preliminary statement,[4] outlined COSATU's view of the pertinent international labour standards on the matter and, for each issue, specified the remedy sought by COSATU. Invariably they asked for government action to repeal or amend the legislative provision criticised, or to cease the impugned administrative practice, as well as urgent and stringent investigation of crimes of violence against COSATU, its affiliates and their members. They also called for simplification of the legislation as a whole and for the Government of South Africa to procure and ensure that the different legislative authorities in the homelands, for so long as they existed, complied with international law on freedom of association as amplified by the Commission.

89. The representative of the Government pointed out that the evidence showed beyond doubt that the labour situation in the country was not simple and straightforward and was not susceptible to any simple solutions. Noting, however, the element of goodwill between employers, labour and Government, the Government expressed the belief that these three parties would arrive at a solution fair and equitable to all. The Government therefore urged the Commission not to formulate detailed suggestions, but rather to deal with the matter before it on a broad basis, leaving it to the parties themselves to reach finality. The Government formally accepted without dispute the following facts:

- a large number of workers had over the years suffered great hardships because of the apartheid laws;
- the rights of free association of these workers were often curtailed to a great extent;
- unions and their members were often harassed by officers of the State and in some cases by employers;
- the industrial courts which came into being in 1979 had often proved to be a cumbersome means of redressing wrongs, with the result that there had been grave injustices committed on occasion;
- certain workers, particularly farm and domestic workers, who were not protected by the provisions of the existing labour legislation, had been exploited as a result of this fact;
- the ravages of the apartheid laws had left millions of people without an education so that they were not properly able to compete in the labour market;
- although the position had improved since February 1990, there were still problems in the labour sphere in South Africa;

- COSATU and certain unions similar to it had become militant political bodies which up to now had provided the only effective voice of the large voteless population by their ability to embark on industrial action in order to have the political grievances of their constituency made public.

90. The Government emphasised that South Africa was undergoing a dynamic change towards a democratic society, and that one of its aims was to guarantee the right of all citizens to enjoy universally accepted human rights, freedoms and civil liberties. Thus, the ILO principles on freedom of association would be fully accepted.

91. The Government recalled that, throughout the hearings, it had placed special emphasis on the present situation in South Africa. It had repeatedly stated that it regarded any debate on past events as being of secondary importance. It proceeded to deal with the various central issues as described by COSATU and conceded on many specific points the need to reinvestigate the effects of various laws and to better regulate the legal and institutional systems. For example, it conceded the need to improve the present industrial court system and to streamline its operations in accordance with ILO standards. Lastly, it considered it inappropriate to comment on the redress sought by COSATU for the homeland situation since the Department of Foreign Affairs had advised that, as far as Bophuthatswana, Ciskei, Transkei and Venda were concerned, the Government's position was to let them choose themselves whether they wished to be reincorporated into South Africa.

92. In conclusion, the Government stated that it would welcome the advice of the Commission in regard to the various labour problems which had been the subject-matter of the Second Session hearings, on the understanding that there would be no recommendations of detailed rules. These should be left to discussion and negotiation between employers and the unions.

Notes

[1] See Annex II.

[2] See Chapter 2, para. 24.

[3] See Chapter 2, para. 22.

[4] See para. 57 above.

CHAPTER 4

THIRD SESSION - ADOPTION OF THE REPORT

93. The Commission held its Third Session in Geneva from 4 to 8 May 1992 for the purpose of finalising and adopting its report.

94. As had been agreed at the opening of the Second Session,[1] an advance copy of this report was transmitted to COSATU and the Government, on a confidential basis, to allow for consideration of it and the preparation of comment, if so wished, prior to both being tabled in the ILO Governing Body.

95. The records of the hearings of witnesses before the Commission, as well as a full set of the documentation submitted to it and copies of this report, have placed in the ILO Library.

Note

[1] See Chapter 3, para. 55.

PART III: The social and historical background

CHAPTER 5

THE SOCIAL CONTEXT

(a) The origins of apartheid

96. Under the terms of its mandate, revised as agreed by the parties, the Commission has been charged with the task of deliberating on and considering the present situation in South Africa as it relates to labour matters, with particular emphasis on freedom of association. In fulfilling that role, the Commission is conscious of the need to keep in mind a wider context. In South Africa that inevitably includes consideration of apartheid. The Commission is aware of the material assembled over a lengthy period on this subject by the ILO. In particular it has found the Special Reports on Apartheid of the Director-General of the ILO concerning labour matters to be of great value.[1] These have surveyed the measures taken under apartheid during three decades. They provide an invaluable source of descriptive and statistical data. No brief summary of the situation depicted in those reports would suffice to convey the complex network of legislation, administrative apparatus, economic factors, social forces, pressures and practices from which apartheid was fashioned as a system of control of the lives of all South Africans.

97. An awareness of the wider context is especially important in relation to South Africa, now in the process of dismantling laws and policies which seriously diminished human rights and civil liberties generally and freedom of association and collective bargaining in particular.[2]

98. Apartheid, or separate development of different races, was adopted in South Africa as the basic policy of the South African Government after 1948. In the period since 1990 it has now been abandoned officially. The final removal of all vestiges of the laws, policies and attitudes which sustained apartheid remains to be achieved. However, much progress has been accomplished. The Commission's visit to South Africa afforded it the opportunity to see, at first hand, evidence of the continuing problems and real progress towards their solution.

99. Over the years since 1948, apartheid came to dominate virtually every aspect of economic and social activity in South Africa of relevance to the mandate of the Commission. In that sense, apartheid was the context within which the Commission's deliberations took place. It was not just a backdrop against which issues relating to freedom of association were to be considered. It was an essential constituent of the way in which most of the pressing issues presented to the Commission had arisen. It was so treated by all of those involved in this inquiry.

100. It is appropriate to record some of the features of the system of apartheid as they emerged, and the extent to which they are still present in South Africa. In doing so the Commission does not pretend to a full exposition.

101. The foundation of apartheid was the formal prescription of distinctions based on race, affecting all aspects of the political, economic and social existence of the South African population. Apartheid institutionalised and gave the force of law to racial segregation. It did so through the enactment of a substantial array of legislation. Some of this legislation was directed specifically to labour matters. However, all of it

had an impact in one way or another on the social and economic life of the country.

102. Historically, racial and social segregation was secured through the enactment of a number of measures of which only a few will be briefly mentioned here. Some have their origin in measures which preceded the election of the National Party to the Government in 1948. The 1913 and 1936 Land Acts reserved only some 13 per cent of the land of South Africa for Blacks. Outside these "reserves" or "homelands" (described in more detail later in this chapter), Blacks could not own, or in most cases even rent, land. Thus in the 87 per cent of the territory of South Africa, known as the "White" areas, Blacks were excluded from permanent occupation. These areas included all the large towns and developed agricultural land. In them, Black South Africans could work but they were not permitted to establish their own homes or communities.

103. The Urban Areas Act, 1923, confined Blacks to segregated townships or locations. Blacks over 16 years of age were required to carry a "pass" or reference book. This recorded any permission they had to work and live in a particular White area. These pass laws (or influx controls) had several objectives. These included:

- to restrict the number of Blacks entering the White areas, especially the towns;

- to limit and control the bases of their presence in such areas, thereby preventing permanent settlement;

- to allocate labour between sectors and regions of the country, in effect channelling a large proportion of Black workers towards employment on White farms;

- to facilitate social control by reducing urban unemployment, crime and the development of slums; and

- to facilitate enforcement of residential segregation, not only for social but also for security purposes.

104. In addition to pass laws, the employment of Blacks was regulated by laws, such as the Native Labour Regulation Act, 1911, and the Native Service Contract Act, 1932. These rendered a breach of contract by Black farm and mine workers a criminal offence. In effect, such laws meant that Black workers could not legally leave their jobs without their employers' consent.

(b) The legislative machinery of mature apartheid

105. Racial devisions in South Africa were also reinforced by the Population Registration Act, 1950. This classified the whole population by race, based on appearance, descent and "general acceptance". By this Act, South African society was divided into four main racial categories: (i) the Whites who were of European descent and whose forebears arrived in South Africa from 1652 onwards; (ii) the mixed-race Coloureds, who were partly descended from the Whites, especially the Afrikaners; (iii) the Asians, who came as indentured labourers primarily from India in the late nineteenth century; and (iv) the Blacks who were indigenous Africans. Borderline cases, where the race of the individual was not clear or was disputed, were decided by a Race Classification Board. In the course of its inquiry, the Commission

was given remarkable evidence concerning the extraordinary means utilised to classify persons into these four categories by race.

106. The Group Areas Act, 1950, further restricted the residential and trading rights of all Blacks and also of the Coloured and the Asians. As a result of this Act, by 1980, 118,000 Coloured and Asian families, involving over a quarter of all Coloured and Asians, were forced to move their homes and businesses, often losing them and provided with very low amounts of compensation.

107. Under the policy of apartheid, educational and training policies were carried out with the intention of reserving particular jobs for specific racial groups. The Bantu Education Act, 1953, centralised control of Black education which had formerly been managed largely by the Provinces and churches. State expenditure on education for Blacks was pegged to the level of taxes raised from Blacks. Vernacular education was made compulsory in Black primary schools, ostensibly to promote tribal cultures. In senior schools, both official languages, English and Afrikaans, were added to the curriculum. Although some Black students had earlier attended universities in South Africa the misleadingly titled Extension of University Education Act excluded Blacks from the formerly open English-language universities. Until recently they were not admitted to the Afrikaans-language universities. Separate ethnic universities were set up for Blacks in each "homeland".

108. Some of the more notorious of the foregoing apartheid laws have been repealed or amended recently. Most of the changes followed the speech by the State President, Mr. de Klerk, to Parliament in February 1990, although some modifications of the rigidities of apartheid had occurred under President Botha. One set of provisions which does, however, continue in force is that concerning the "homelands". These were created as part of the programme of "Greater Apartheid" in the decades following 1960. They represented an attempt to provide distinct territorial entities for a form of "self-government" by specified ethnic or tribal groups. However, they had a more pressing purpose. It was to control the movement of the residents of such homelands seeking work as migrant labourers within the residual area of the Republic of South Africa. Four of these entities have been recognised by the South African Government as independent States. No other nation or international organisation has provided recognition. The remaining territories have been provided by South African law with varying degrees of automomy, including what is described as self-government (subject to the residual authority of the South African legislature). The future of all of these territories remains to be determined as part of the process of creating a new South Africa through CODESA.[3]

109. With the structural and legislative features of apartheid described above, South Africa has suffered from the absence of a democratic system of government. This fact is most graphically illustrated by the exclusion of the Black population, which makes up some three-quarters of the total (approximately 29 million of the total of some 38.5 million), from the parliamentary electorate. According to the latest available officially accepted classification, the total estimated population of South Africa is 38,445,400. Of these, 29,062,500 are Blacks (including those in or from the "homelands"); 992,600 are Asians; 3,299,400 are Coloured; and 5,090,900 are Whites. Of the White population, approximately 55 per cent are Afrikaans-speaking. Although Whites have always dominated the parliamentary institutions of the country, the Constitution which has been in force since 1983 has also allowed for separate chambers of Parliament elected by Coloured and Asian voters respectively. The Constitution also provides for an executive Head of State, the State President, who presides over a Presidential Council composed (amongst others) of members of the three chambers of the

legislature. It has also had no Black members. The executive Goverment is conducted by ministers and deputy ministers, charged with responsibility for particular departments of state. None of them is, or has ever been, Black.

(c) An economy of wealth and inequality

110. Needless to say the foregoing elements in the system of apartheid engendered fierce opposition both in South Africa and throughout the world. To meet the former, a formidable machine of state power was established for the maintenance of the apartheid system, and for the suppression of opposition, especially by movements representing Blacks. Despite this, there continued to exist, throughout the period of apartheid, a number of bodies and individuals which became the focus of resistance. These included civic associations and trade unions whose membership was derived largely from among the Black population. The development of a non-racial trade union movement over the last 20 years, and the increasing extent to which it has been composed of Black workers, have been noteworthy aspects of recent social developments in the country. In default of other outlets for attention to urgent social and economic concern, it was inevitable that the trade union movement would fill the institutional void. During the melancholy years of apartheid, the union movement fulfilled a vital function in preserving the hope of freedom and of basic rights.

111. The foregoing features of South African society developed in an economy which has generated considerable overall wealth. The latest figures for the gross domestic product of the Republic of South Africa put the total at over R225 billion (US$80 billion). Per capita GNP amounts to approximately US$2,290, or R6,410. As a result of its substantial mineral resources, an extensive agricultural industry and a significant industrial and manufacturing sector, South Africa has very many significant economic advantages. There is also a very large public sector, which has expanded considerably. This has occurred, among other reasons, because of the proliferation of separate administrative sructures for the different races, and because of the creation of distinct political entities for different groups of Blacks (homelands). The public sector is still the largest employer in the country.

112. Among the consequences of the foregoing economic and social phenomena has been the growth in South Africa of a large urban population. This coexists with widespread conditions of rural poverty. Both conditions, to an overwhelming extent, affect Blacks. The economic and social structures have long exhibited, and to a very considerable extent continue to manifest, a very high degree of inequality. Generally speaking, this operates to the benefit of Whites and to the detriment of people of other races.

113. A remaining matter which requires mention is the extent to which violence appears to have been a prevalent feature in South African society. It is demonstrated by statistics on violent crime. It is evidenced by the varieties of confrontation that have taken place between bodies active in the political and social spheres, not excluding the state authorities. Details on alleged anti-union violence appear in Chapter 10 of this report.

(d) The abandonment of apartheid and the establishment of CODESA

114. Apartheid has now been abandoned as the official policy of the South African Government. From 2 February 1990, a series of moves set the process of apartheid in reverse. These moves are still taking place. They include:

- the removal of bans formerly applying to a number of political organisations, principally those representative of the Black population;
- the lifting of the State of Emergency;
- the release of political prisoners;
- the repatriation of exiles;
- the repeal of legislation embodying various aspects of segregation and overt discrimination on the basis of race; and
- the official commitment to negotiate the creation of a democratic framework for South Africa.

115. Another development which has occurred even more recently has been the signing of a National Peace Accord by some 27 organisations of national importance. The object of this Accord is to establish a framework for overcoming violence in the country. The Accord was signed in September 1991. The signatories included not only the Government and virtually all major political parties and movements, but also the leading non-racial trade union organisations and the South African Council of Churches.

116. Amongst the fundamental principles acknowledged in the Accord are those relating to democracy and human rights. There is also a chapter on measures to facilitate socio-economic reconstruction and development. Another chapter contains a code of conduct for political parties and organisations. There is also a chapter on the security forces. It contains a set of detailed requirements to be observed by the police. It proposes supervisory machinery to ensure compliance. A further set of provisions relates to the establishment of the Commission of Inquiry regarding the prevention of public violence and intimidation. Another creates institutions designed to secure the cooperation of all bodies concerned in the implementation of the Accord, i.e. a National Peace Secretariat, in addition to Regional and Local Dispute Resolution Committees.

117. A final development of great importance should be recorded. It occurred in December 1991 when the Convention for a Democratic South Africa (CODESA) was convened. This brought together major national political organisations for the purpose of determining the process by which a new constitutional structure for South Africa could be formulated. The Declaration of Intent made on that occasion is attached to the report as Annex VII, which also contains the mandates of the working groups established for putting the Declaration into effect. The working groups have continued to meet. Progress towards agreement on a timetable has been reported. Agreed machinery for the framing of the new Constitution is being considered, as is the possibility of instituting interim administrative arrangements involving those who have hitherto been excluded from the Government.

118. These were the conditions which the Commission found when it arrived in South Africa. During its visit, the South African Government party lost an important by-election in the Parliament. This caused the State President to announce the conduct of a referendum to permit the White population to signify

its approval or disapproval of the policies which his Government had been pursuing. The referendum was conducted on 17 March 1992 between the Second and Third Sessions of the Commission. A vote of 68.7 per cent was recorded in the White constituency in favour of the State President's policies. This vote appears to endorse the present policies of reform. It also appears to confirm the intention of South African authorities that more reforms will continue until a democratic government is established which respects basic rights, including those contained in ILO standards affecting freedom of association and collective bargaining.

Notes

[1] See the series of reports which have appeared annually since 1965 entitled Special Report of the Director-General on the application of the Declaration concerning the Policy of Apartheid in South Africa.

[2] See, generally, the Resolution concerning trade union rights and their relation to civil liberties, adopted by the International Labour Conference at its 54th Session, Geneva, 1970.

[3] See para. 117.

CHAPTER 6

DEVELOPMENT OF THE LABOUR RELATIONS SYSTEM

(a) An historical background of labour legislation

119. The regulation of industrial relations and employment standards in South Africa has been dealt with by a number of separate statutes. Each of these statutes covers a different aspect of the employer/employee relationship but generically they deal with labour relations. For purposes of this report, this chapter will focus mainly on the Industrial Conciliation Act, 1956, and its subsequent amendments. This Act took over and developed a system originally introduced by the Industrial Conciliation Act, 1924.

120. The Industrial Conciliation Act, 1956, governed the registration and regulation of trade unions and employers' organisations, the prevention and settlement of disputes between employers and employees, the regulation of terms and conditions of employment by agreement and arbitration and the control of private registry offices. It provided for the establishment of industrial councils and conciliation boards as a forum for collective bargaining and dispute resolution. It also provided for the establishment of an industrial tribunal and defined its functions. This statute was concerned with regulating trade unions and collective bargaining on a racially segregated basis. Although it applied to three population groups (the Whites, the Coloureds and the Asians), it did not apply to Black workers at all since it excluded them from the definition of "employee" so that they could not come within its framework. Moreover, section 77 of the Industrial Conciliation Act provided for statutory job reservations whereby, upon the recommendation of the industrial tribunal, the Minister could make a determination to the effect that work of any specified class could be reserved, either wholly or partially, for persons of a specified race. This Act prohibited the registration of new trade unions comprising members of more than one of the racial groups to which it did apply and provided that, where a registered trade union already had members from more than one group, these different groups should be in separate branches and should hold separate meetings. It also imposed a racially based limitation on the holding of trade union office in that it entrusted the management of the union to an executive consisting solely of "White" persons. Members from the other racial groups could not participate in the meetings of the executive except with its consent.

121. A separate statute called the Black Labour Relations Regulation Act, 1953, applied exclusively to Black workers. This Act was designed to provide for the regulation of conditions of employment of Black employees; for the prevention and settlement of disputes between such employees and their employers; and for the establishment and functions of committees consisting of such employees or on which they were represented.[1] Since this Act made no reference to trade unions and since Black workers were not "employees" in terms of the Industrial Conciliation Act, 1956, this ensured that Blacks could not belong to a registered trade union or take part in industrial council or conciliation proceedings. Furthermore, the Black Labour Relations Regulation Act specifically prohibited strikes by Black workers, including "sympathy" strikes, and prohibited them from instigating or inciting others to take part in strikes.

122. However, this Act provided that in establishments employing not less than 20 Black employees, such employees could request the formation of a works committee.[2] The idea was that such committees would have an important role in the prevention and settlement of disputes involving Black employees. In

practice, very few works committees were formed under the terms of this Act. However, many non-statutory works committees were formed in such establishments where members of these committees included not only representatives of Black employees but also of management. But direct negotiation of conditions of employment between management and labour were not provided for by this Act.

123. The exclusion of Black workers from the industrial relations system and the policy of White worker protectionism sharply divided South African workers along racial lines. Evidence was given to the Commission that the result was twofold: First, unions whose members were semi-skilled White workers, particularly those employed in the parastatals, achieved gains for their members through their political access to the State. Consequently, these Whites-only unions rarely went on strike. Secondly, Black workers organised themselves independently from the mainstream of the labour movement. Besides being subjected to a Master and Servant Act which criminalised those who broke their contracts, these workers were controlled at every turn by the pass system and a string of racially discriminatory laws which regulated almost every aspect of urban life. In these circumstances, Black unions were small and vulnerable. Nevertheless, they were remarkably resilient. Excluded from the industrial relations system from the very beginning, and deprived of the political franchise, this Black workforce developed a political trade union tradition which it consolidated and strengthened with time.

124. Early in the 1973 session of Parliament, following a series of strikes by Black workers in major cities in South Africa, the Minister of Labour indicated that the Black Labour Relations Regulation Act would be amended so as to improve the system of consultation and communication between Black employees and their employers. Consequently, an Amendment Act was adopted on 29 June 1977. It provided, inter alia, for the establishment and functions of coordinating liaison committees and conferred powers on various committees to negotiate and enter into agreements with their employers on wages and other conditions of employment.[3]

125. The 1977 amendment to the Black Labour Relations Regulation Act, 1953, was the subject of considerable criticism for various reasons. One reason given was that its immediate effect was to strengthen the works and liaison committee system and to undermine the growing Black trade union movement through the introduction of an alternative system. Moreover, agreements concluded under the Act were more limited in scope than those for other racial groups under the Industrial Conciliation Act, 1956, and the procedures for their enforcement were less effective. The negotiating powers conferred upon these committees were also opposed generally by organised labour as being more limited than those of industrial councils. In addition, employers feared being drawn into two separate negotiating situations where they would have to apply two different agreements at the same time for the same class of work.

126. It was against this background that on 21 June 1977, the Government appointed a Commission of Inquiry (known as the Wiehahn Commission, after its Chairman, Professor N.E. Wiehahn) to inquire into, report upon and make recommendations in connection with the industrial relations system and more specifically with a number of statutes administered by the Departments of Labour and Mines.

(b) Legislation based on the recommendations of the Wiehahn Commission

127. The appointment of the Wiehahn Commission was regarded as providing an opportunity for major recommendations to be made concerning revisions to labour legislation including the Industrial Conciliation Act, 1956, and the Black Labour Relations Regulation Act, 1953, with specific reference to modernising the existing system for the regulation of labour relations and the prevention and settlement of disputes, eliminating bottlenecks and problems within the entire sphere of labour, and laying a sound foundation for labour relations in the future. The Commission's report was produced in the period 1979-81 and resulted in a series of enactments, two of which are of particular significance in the context of the present report: the Industrial Conciliation Amendment Act, 1979, and the Labour Relations Amendment Act, 1981. Further amendments were made in 1982, 1983 and 1984 and are mentioned insofar as they are significant for an understanding of the evolution of the labour relations system.

128. The Industrial Conciliation Amendment Act, 1979, established the National Manpower Commission (NMC), a national coordinating and advisory body whose function was to participate in the design and planning of labour policy and programmes, and to survey the industrial relations system and its functioning with a view to submitting recommendations to the Minister of Manpower on legislative and other adjustments that were thought to be necessary. The NMC was appointed on a tripartite basis by the Minister, with an executive committee nominated by it.

129. The Industrial Conciliation Amendment Act, moreover, repealed the job reservation provision. It also provided for the recognition of trade unions with Black employees as members. The definition of "employee" was accordingly changed in the Act in order to include Blacks for the first time but limited the categories of Blacks covered to those in fixed employment who could legally reside on land in the Republic of South Africa.

130. This conditional admission of Blacks to the industrial relations system provoked considerable criticism in Parliement and from a number of trade union organisations.[4] This resulted in the Minister exercising the discretionary powers granted to him in the amended legislation which entitled him to include "a member of any other group or class of persons" within the new category of "employee". In September 1979 the Minister added to those already included persons in employment who were South African citizens or who were citizens "of a state the territory of which, or part of which, formerly formed part of the Republic". According to this proclamation, both migrant workers and commuters from the Bantustans could become members of registrable trade unions. Foreign Black workers however were still excluded.

131. In respect of the racial composition of trade unions, the Act prohibited the registration of "mixed" trade unions. In the case of such unions that were already registered, the Act maintained the restriction on the election of office-bearers to White workers. With regard to collective bargaining, the Amendment Act stipulated that no additional parties would be admitted to an industrial council unless all existing parties had agreed in writing. The new legislation provided, however, for an aggrieved party to appeal to the Industrial Court established by the Act within 30 days of the refusal of an application for admission. This statutory provision nevertheless offered unions which were already members of industrial councils as well as employer members, the opportunity of exercising a veto over acceptance of a newly registered union.

132. Finally, the Act provided for an Industrial Court to replace the Industrial Tribunal.

133. The Act also introduced the concept of the "unfair labour practice", which was defined in section 1 of the 1979 Act as "any labour practice which in the opinion of the Industrial Court is an unfair labour practice".[5]

134. Disputes concerning whether the conduct of an employer or of workers constituted an unfair labour practice had in the first instance to be brought before the competent industrial council, or a conciliation board if no industrial council was competent. If it was not possible to settle the matter at that level it could be referred to the Industrial Court for determination. In 1982 the Court was also given the power, exercised until then by the Minister, to make status quo orders imposing a temporary stay on the conduct alleged to constitute an unfair labour practice until the dispute had been resolved by conciliation or by the Industrial Court.

135. The Labour Relations Amendment Act, 1981, which changed the title of the original Act to the Labour Relations Act, 1956 (LRA), removed racial discrimination from the original Act and from the industrial relations system. First, all explicit references to race were removed from the Act. Secondly, the definition of "employee" was changed under the Act so that all workers in South Africa (excluding those in agriculture and domestic service) could, subject to the rules of the union, join trade unions of their choice. Trade unions of any racial composition could register under the 1981 Act. Consequently, provisions which had previously required racially separate branches and meetings and all-White executive committees within racially mixed unions were repealed. The division of assets on racial grounds within a mixed union and certain advantages given to White unions in the registration process were also removed.

136. The 1981 Act repealed the Black Labour Relations Regulation Act, 1953, which had provided for the separate committee system for Blacks. The committee system was not abolished, however, but transferred to the Labour Relations Act, 1956, where the committees (now called works councils) could be racially mixed. Thus, the racially based dual system of industrial relations no longer existed.

137. The 1981 Act introduced new controls over both registered and unregistered trade unions. Previously, affiliation to and financial support of political parties by registered trade unions were prohibited. The 1981 Act added further restrictions which included the influencing of trade union members with the intention of aiding a political party or a person seeking office in a political party or in a legislative body. These restrictions applied to registered _and_ unregistered trade unions and federations. The 1981 Act also revised the definition of a trade union. Whereas previously a trade union was an organisation whose "primary purpose" was the regulation of relations between employers and employees, according to the 1981 Act it was an organisation whose purpose "whether by itself or with other purposes" was to regulate matters of common interest between employers and employees. This change implied that Black political and community groups which had played a role in local industrial relations issues were also included in this definition which meant that they were also subject to the controls exercised over unregistered trade unions.

138. Another restriction imposed on all trade unions and federations of trade unions was that the head office of such organisations had to be situated in the Republic of South Africa. This prevented the establishment of trade union head offices in "independent homelands" (the territories of Transkei,

Bophuthatswana, Venda and Ciskei) and "self-governing homelands" (for example, the territory of KwaZulu).

139. The 1981 Act also prohibited the payment of strike pay with the intention of "inducing" or "enabling" a striker to take part in an illegal strike. Such payment was a criminal offence and subject to a fine of R1,000. Those engaged in illegal strikes were also subject to increased fines of R1,000 or one year's imprisonment or both.

140. Moreover, certain requirements which had previously been applicable to registered unions were extended to unregistered unions. These provisions involved giving details of the union's address, constitution, names of officers and officials to the Registrar. In addition, unions had to maintain records and audited accounts and prepare annual statements. They were subject to inspection by the authorities and certain requirements were laid down for internal voting and electoral procedures.

141. With regard to the deduction from wages of trade union dues (stop orders) by employers, both registered and unregistered trade unions could make stop-order arrangements with employers prior to the 1981 Act. In case of a dispute, registered unions could apply to the Minister for compulsory stop orders which he could refuse. The Minister retained this power of refusal vis-à-vis registered trade unions under the 1981 Act, which also introduced a prohibition on stop-order arrangements between unregistered unions and employers unless authorised by the Minister.

142. Under the repealed Black Labour Relations Regulation Act, 1953, the Minister had the authority to establish legally binding minimum wages and conditions of employment for Black workers on the advice of employers in a particular industry. These were promulgated as Black Labour Orders. These measures were transferred to the Labour Relations Act, 1956, and applied to workers of all races in industries not covered by industrial council agreements.

(c) Developments since 1981

(i) Subsequent amendments to labour legislation

143. By the Labour Relations (Amendment) Act, 1983, the power to apply for the establishment of a conciliation board for the settlement of a dispute for which no industrial council was competent, hitherto reserved to registered trade unions, was extended to unregistered trade unions provided they had complied with certain formal requirements.

144. The following year, the Labour Relations Amendment Act, 1984, was adopted. It introduced a new provision into the Act, section 31A, under which agreements between trade unions and employers' organisations (other than those entered into between parties to a conciliation board or an industrial council) would not be enforceable in any court, including the Industrial Court, unless the organisations concerned had complied with the provisions of the LRA relating to registered or unregistered organisations, as the case may be. For unregistered unions, these included the submission of their constitution, head office address and names of office-bearers and officials to the Industrial Registrar. Further, particulars of the agreement itself have to be submitted to the Department of Manpower.

145. Section 51 of the Act empowered industrial councils or the Minister to grant exemptions of classes of person, or exclude certain areas, from the provisions of industrial council agreements. The 1984 Act made two changes in this regard. First, it provided that appeals from industrial council decisions concerning exemptions (which under the 1982 Act went to the Industrial Court) should be to the Minister. Secondly, it extended the factors on which the Minister could base his decision to exclude certain areas or classes of work from the provisions of an agreement to include the interests of employers and employees as well as the public or national interest. Official reasons given for this change were that the Minister wished to encourage the growth of new small businesses and of border industries which were handicapped by "high" minimum wage rates. The Minister could thus grant exemption from negotiated agreements in the interests of employers who went to the border areas or who set up small businesses.

(ii) Growth of the trade union movement

146. As a result of new Black membership which became possible following changes in the labour legislation, the development of trade unionism in South Africa continued at an increased pace in 1981. Official figures showed that on 31 October 1981, 199 unions were registered of which 78 were White, 51 Coloured, 22 Black and 48 Mixed.[6] Although emerging unions whose membership was almost entirely Black were given the opportunity to participate in the official industrial relations system, most initially refused to register either as a matter of principle, or because of the greater government control that registration would entail. Another reason was that significant Black unions were "general" unions and the registration of "general" unions, spread across industries, did not fit easily into the South African system of registration which required unions to be industrially based in order to conform to industrial council organisation. Moreover these emerging unions stayed out of industrial councils because the latter were still dominated by the established unions. These emerging unions gave considerable attention to the creation and strengthening of shop steward committees in factories organised by those unions. These shop steward committees had negotiating and other organisational rights within the plants. Moreover, they were visible, representative of the workers, and provided a link with the wider trade union structure.

147. The degree of labour unrest in the early 1980s was much higher than that recorded in the late 1970s and approached the levels of 1973-74. During the latter period the unrest was confined to certain areas and to certain industries and the issue was almost exclusively wages, whereas in the early 1980s the pattern was different. During this period, strikes were widely spread and affected all industrial centres. Issues included wages, dismissals, union recognition, working conditions, pensions and retrenchments.

148. From the outset, the emerging unions pursued efforts to achieve national unity, represented initially in particular by the Federation of South African Trade Unions (FOSATU).

149. In a significant development the formation of a new trade union federation, the Congress of South Africa Trade Unions (COSATU) was formally announced at a founding conference on 30 November 1985. The new body, composed of 35 trade unions was the outcome of considerable work by various trade unions and trade union groups, some of which withdrew from the "unity talks". These 35 unions were non-racial unions with predominantly Black membership and concentrated in the manufacturing, mining and service sectors.

150. The Council of Unions of South Africa (CUSA), which withdrew from the unity talks which led to the formation of COSATU, itself started new unity talks with the Azanian Congress of Trade Unions (AZACTU). These talks led to the formation of a new federation, the National Council of Trade Unions (NACTU) whose unions were concentrated in the electrical, metal, mining and construction industries. Both COSATU and NACTU continued to bring about mergers of affiliated unions on an industrial basis, thus pursuing movements towards trade union unity.

151. The total membership of registered trade unions continued to rise sharply during the mid-1980s to the 1990s, partly because of the registration of a number of previously unregistered unions and partly because of a rise in membership among all population groups. The use of strike action and the number of workers involved also continued to increase during the same period. "Stay-aways", as opposed to orthodox strikes, were also widespread during this period, which illustrated that the emerging unions used industrial action in pursuit of a far wider range of objectives than before. A majority of those involved in strikes and work stoppages were Black, so much so that after the publication of statistics of strikes, applications for conciliation boards and Industrial Court cases during 1986, the Chairman of the NMC reacted by saying: "It is becoming more apparent that Black workers are more and more aware of their power base in the economy through the withholding of their labour".[7]

152. The above was highlighted by the 1987 strike by members of the National Union of Mineworkers (NUM) in the gold and coalmining industries, which was the largest strike in South African history (340,000 miners downed tools). A breakdown of the annual wage negotiations with the Chamber of Mines led to a decision by mining companies to impose wage increases of 15-23 per cent rather than the 27-30 per cent demanded by the NUM. In addition, NUM had demanded improved leave, the recognition of the anniversary of the Soweto uprising of 16 June 1976 as a paid holiday, higher danger pay and death benefits. The strike lasted for three weeks and was characterised by severe harassment of strikers by mine security staff and the dismissal of 50,000 workers (40,000 of whom had been striking legally). During the strike 31 gold and coal mines were affected and 11 people were killed, 600 injured and 500 arrested. After three weeks, in the light of the rising death toll, the large-scale dismissals and the employers' continued refusal to agree to the increases demanded by NUM, the latter settled for the 23 per cent offered by the Chamber but did obtain improved holiday leave allowances and death benefits. In spite of NUM's failure to obtain what it had originally demanded, the strike was considered by most observers to have been a major feat of organisation by a trade union which had been in existence for only five years, had limited resources, had a membership (without strike pay) that was spread over huge areas and that had been "bombed out" of its head office premises only two months earlier. Most observers also questioned the right of employers to dismiss workers who were striking to improve their working conditions given that the strike was legal.

153. As in previous years, a number of "stay-aways" took place in 1987 which, though not included in official strike statistics, frequently involved large numbers of workers. Although the Government banned May Day rallies in 1987 under the state of emergency powers, COSATU called national days of protest on 5 and 6 May supported by hundreds of thousands of workers. Similarly, 70 per cent of Black, Coloured and Asian workers did not attend work on 16 June. Thus, in spite of the State of Emergency, the large-scale detention of Black political opponents and the restrictions on the press, opposition to the Government, partly through the trade union movement, continued. As a consequence, the Government introduced new legislative proposals to restrict further trade union activities in the form of the Labour

Relations Amendment Bill, 1987. This Bill became the major focus of dispute between COSATU and NACTU on the one hand, and the Government and the employers on the other. Following a failure of attempts to lessen these differences, in May 1988 COSATU submitted to the ILO the complaint against the South African Government which is at the origin of the work of the Commission. The Government, however, promulgated the Labour Relations Amendment Act, 1988 (LRAA), in October of that year.

154. NACTU's position on the 1988 Act was similar to COSATU's and the two federations agreed to act jointly against the new labour legislation. The employers, through the South African Consultative Committee on Labour Affairs (SACCOLA), stated their reasons for giving broad support to the 1988 Act. The labour movement saw the new legislation as an attempt to curb the economic strength as well as the political assertiveness of the trade union movement, and suppress the gains made by workers since the late 1970s.

155. The workers' protest movement against the 1988 Act continued to escalate in 1989. Protest marches by tens of thousands of workers were staged around the country in August; a two-week consumer boycott of White businesses was launched; a national ban was placed on all overtime work; and a massive two-day stay-away in September was organised in joint protest against the LRAA, the tricameral parliamentary elections, the State of Emergency and all apartheid laws (an estimated 3 million workers took part in this September stay-away around the country). In response to the unions' campaign, the Government decided to instruct the NMC to review parts of the Act. Although SACCOLA accepted that there were provisions in the Act that needed to be changed and a number of meetings were held between itself and COSATU and NACTU, talks were suspended in September because employers objected to the demonstrations during the period of negotiations.

156. COSATU and NACTU established the National LRAA Coordination Committee which planned for a continued campaign in 1990 unless certain changes were agreed to. The continued militant campaign by COSATU and NACTU against the 1988 amendments resulted in an agreement with SACCOLA (the CNS Accord already referred to in Chapter 2) on 11 May 1990, regarding changes to be made to the law and the extension of basic worker rights to all workers. Although this Accord was initially rejected by the Government, following the establishment of a working party to discuss labour legislation and COSATU's threat to call a general strike unless adequate labour legislation was established, the Minister of Manpower reached an agreement (referred to as the Laboria Minute - see Annex II) with COSATU, NACTU and SACCOLA on 14 September 1990. In February 1991, the Labour Relations Amendment Act which was based on the agreement reached in the Laboria Minute, repealed the most controversial features of the 1988 Act.

157. The membership of registered trade unions had increased from 808,053 in 1980 to 2,750,400 in 1991. However, total union membership stood at over 3 million, since membership of unregistered unions was approximately 300,000 in 1991. This means that approximately 45 per cent of the labour force that falls under the LRA is unionised.[8] Although this growth has been facilitated by the heightened political consciousness of workers, together with the organisational efforts of trade unionists, it would seem that the tangible gains made by unions in terms of wages and conditions of service for their members has demonstrated to workers the benefits of unionisation. This growth in union membership has been confined to the emerging unions.[9] They have been able to articulate effectively the demands of their members, particularly due to the strong shop-steward system that was developed within these unions. The vast majority of shop stewards who have negotiating rights within the plants now have formal recognition from management, so much so that plant-level bargaining is now established within the South African collective

bargaining system. These shop stewards are subject to regular elections, either through a show of hands or through secret ballot, with the result that a strong democratic political culture has developed within the labour movement. In a recent survey of shop stewards in COSATU, the latter defined their chief duties as representing workers and promoting worker rights.[10]

158. Of the six trade union federations in South Africa, COSATU is the largest, with a total membership of over 1.3 million workers. COSATU has grown rapidly since its inception on 1 December 1985. It has also consolidated its original 35 trade unions into 14 nationwide industrial unions. It is a non-racial federation which maintains "active non-alignment" to international trade union organisations, but is affiliated to the Organisation of African Trade Union Unity. With the lifting of the bans on the African National Congress (ANC) and the South African Communist Party (SACP), COSATU announced its decision to join the ANC/SACP alliance. But COSATU at the same time considers it important that the trade union movement remain under the democratic control of its own membership.

159. NACTU, the country's second largest federation after COSATU, has a paid-up membership of around 300,000. It has enjoyed less success than COSATU in bringing about mergers of affiliated unions on an industrial basis. NACTU is not allied to any political party. It represents the black-consciousness tradition in South African trade unions. It has interpreted this as justifying opposition to White leadership in its unions and in this regard it differs from COSATU.

160. Only White workers belong to the South African Confederation of Labour (SACOL), whose membership has decreased from a highpoint of 200,000 in 1975 to just over 119,000 in 1991. This decline is due to the general decline of "Whites only" unions, as well as the lack of a strong organisational structure in these unions. Plans were, however, announced at the recent conference of the White Mineworkers' Union (WMU) to mobilise White workers into a "super union" (as opposed to the SACOL) to fight against the National Party's plan to "surrender the country to the ANC".[11]

161. The Federation of Salaried Staff Associations of South Africa (FEDSAL) represents the middle strata of skilled, supervisory, technical, white-collar and semi-professional workers. The Federation of Independent Trade Unions (FITU) which was launched in September 1991 represents skilled and semi-skilled workers from all races who are politically independent.

162. The United Workers' Union of South Africa (UWUSA), unlike all the other federations, is the only direct product of a political party, the Inkatha Freedom Party. Set up in direct opposition to COSATU on 1 May 1986, it has a paid-up membership of around 32,000. The Commission has concluded from evidence presented to it that since its inception, UWUSA has been involved in few bona fide trade union activities.

163. On the employers' side, SACCOLA operates as a national consultative body which represents its members on issues on which agreement can be reached. It consists of ten employer organisations which vary considerably in size, area of operation, interests and level and extent of involvement in socio-political and industrial relations matters.[12] It was established in 1975 as an attempt to coordinate employer inputs on labour matters. It represents 70 per cent of the firms in the private sector outside agriculture and employs 60 per cent of the South African workforce.

(d) The Labour Relations Act as amended up to 1991

(i) Scope of the Act

164. Under the terms of section 2, the LRA applies to every undertaking, industry, trade and occupation with a number of exceptions. These exceptions include persons employed in farming operations, in domestic service in private households and in the public sector. While public servants (numbering over 750,000) have the right to join and form trade unions, the provisions of the Act with regard to collective bargaining do not apply to them. Furthermore, the Act does not apply to employees working for charitable institutions without payment or to teachers in educational institutions receiving public funds.

165. Nor does the Act apply to the ten territories within South Africa to which the State has granted independence or internal "self-government". These are dealt with separately in Chapter 12(b).

(ii) Trade unions and employers' organisations

166. The procedure for the registration of either a trade union or an employers' organisation is essentially the same (section 4). Application must be made on the prescribed form which is forwarded together with three copies of the constitution to the local office of the Department of Manpower. Section 8 specifies that a constitution should contain provisions with regard to certain matters including the maintenance of records and audited accounts, the preparation of annual statements, internal voting and electoral procedures. The Registrar will then publish the application in the Government Gazette and at the same time will call for objections to registration. Although registration is not compulsory for a trade union or an employers' organisation, it confers certain benefits upon a registered organisation. It may become a party to an industrial council and thereby negotiate agreements which can be made binding in law and subsequently enforced (section 18 ff.). A registered organisation also becomes a body corporate in terms of the LRA and can sue or be sued in its own name; it can acquire, hold and alienate property, movable or immovable (section 5(1)). Section 78(1C) prohibits an employer from deducting trade union membership fees from the remuneration of its employees in respect of a trade union which is not registered unless the Minister has given his prior approval. Moreover, section 79 of the Act protects registered trade unions in the case of legal strikes in that it provides an indemnity to them against civil claims for damages.

167. Unregistered unions and employers' organisations are required to submit a copy of their constitution, head office address and the names of office-bearers and officials to the Registrar under the terms of section 4A. Contravention of this provision constitutes an offence.

168. By the terms of section 78(1) no employer may make it a condition of employment or otherwise stipulate that an employee shall be or shall not be a member of a trade union. Any such condition is void and this applies both to registered and unregistered trade unions. Whilst an employee is free to join any union of his choice, section 24(1) of the Act empowers an industrial council to provide for a closed shop in its agreements. Where a closed shop agreement is entered into, an employer who is party to a closed shop or belongs to an employers' organisation which is party to a closed shop, may not employ a person who is eligible to belong to a union party to the closed shop unless that employee is or within 90 days of starting work becomes a member of the union. Two exceptions to this principle are provided for in sections

48(8) and 49(1). The employee does not, however, have to relinquish membership of any other union which may not be party to the closed shop.

(iii) Industrial councils

169. An industrial council is a forum in which registered unions and employers' organisations meet and bargain collectively in order to formulate an agreement on conditions of employment. An industrial council has to be registered in conformity with the requirements of section 19 in order to benefit from the provisions of the LRA. When the Registrar approves the registration of an industrial council, he will send the council a certificate of registration which sets out the area and interest in respect of which a council had jurisdiction and which defines the nature and extent of that jurisdiction. No council agreement may go beyond the area or industry defined by the registration certificate.

170. An industrial council is set up voluntarily by the representatives of one or more employer bodies and one or more employee bodies. Section 21A stipulates that no new parties may be admitted to an industrial council unless all existing parties agree. An organisation whose application for membership has been vetoed has the right of appeal to the Industrial Court within 30 days of the decision.

171. In addition to providing a forum for collective bargaining within an industry, an industrial council is required to deal with all disputes arising in the industry in respect of which the council is registered (section 23(1)). The constitution of an industrial council is required to provide for a procedure (section 21(1)(f)) for dealing with disputes which arise within its jurisdiction.

172. Unless an agreement entered into by the parties to an industrial council provides otherwise, the procedure will typically require the referral of the dispute to the council in writing (section 27A). The council may establish a committee of representatives (section 25) of both employers and employees to inquire into the dispute or may appoint an official to preside over a dispute meeting.

173. The 1991 Amendment Act contains a number of changes to prescribed procedures in terms of which disputes are referred to an industrial council (see amended section 27A) or, where no industrial council has jurisdiction, to a conciliation board. These amendments remove certain formalities and allow for extended time periods which ease the process of referral.

174. If the dispute is not resolved at an industrial council, the parties may apply for the appointment of a mediator or submit the matter to voluntary arbitration. A dispute arising in an essential service which remains unresolved has to be referred to arbitration.

175. If an industrial council has failed to settle a dispute within a period of 30 days or such further period as the industrial council may decide, any party to the dispute may within a further period of 90 days refer the dispute to the Industrial Court (section 46(9)(b)(i)).

176. Section 24 of the Act sets out the matters that may be dealt with by an industrial council agreement which include provisions relating to hours of work, overtime, wages, benefits and holiday bonuses. Once an agreement is reached at the industrial council and signed by the parties, it is submitted to the Minister of Manpower (section 31). Such agreements only become binding on the industry as a whole once the Minister, by notice in the Government

Gazette, has declared the agreement to be so binding. The Minister may extend the application of the agreement beyond the parties to the industrial council to all employers and employees in the industry. Agreements can be extended or re-enacted by request to the Minister.

177. The evidence presented to the Commission showed that the number of industrial councils operating in South Africa decreased from 105 in 1980 to 91 in 1990. This suggests that fewer workers are being given the statutory protection of such agreements now. It was indicated that this decline could be attributed to the change in employers' attitudes toward centralised bargaining over the years. It was stated in evidence that in the early 1980s, when unions were weak, the employers showed an initial support for centralised bargaining at industrial council level whereas in 1990, when the emerging unions were strong and used the machinery to good effect in advancing the interests of their members, the employers argued that recognition agreements were a logical extension of their decentralised management structure and that industrial relations should be managed at plant level. The same witness suggested that this change in attitude by employers illustrated by employer withdrawals from industrial councils has become a major issue for the union movement which, as part of its campaign strategy, has focused on the right to centralised collective bargaining at industry level. This is due not only to the fact that industrial councils have ensured comparatively higher minimum wages and better working conditions, but also because they have a ripple effect which ensures that poorly organised or unorganised workers benefit from those conditions which apply to the better organised workers.

(iv) Conciliation boards

178. Section 35(3)(d)(ii) makes provision for the establishment of a conciliation board to consider the dispute, if no industrial council has jurisdiction. A conciliation board is an ad hoc body which consists of an equal number of representatives of the employer and the employee parties concerned in the dispute (section 37). Either party concerned may apply to the inspector appointed for that purpose for the establishment of a conciliation board.

179. In the case of essential services and in other cases where an industrial council has no jurisdiction over the dispute, the Minister of Manpower may of his own accord establish a conciliation board. If a dispute which concerns an unfair labour practice cannot be settled by a conciliation board, the dispute may be referred to the Industrial Court (section 46(9)(b)(ii)). An agreement reached before a conciliation board may be made binding on the parties by publication in the Government Gazette.

(v) Mediation/voluntary arbitration/compulsory arbitration

180. Under the terms of section 44 of the LRA, a mediator may be appointed by the Minister to assist the parties to reach an agreement. The appointment may take place on application by any industrial council or conciliation board or the Minister may do so of his own accord if he is of the opinion that it will assist the settlement of the dispute. Although the mediator should be acceptable to both parties, if the latter are unable to agree on the person to be so appointed, the Minister may make an appointment of his choice. The mediator is expected to conduct such inquiries as may be necessary in order to settle the dispute. He acts as chairman of the disputes meeting, but has no vote. He cannot force his views on the parties, nor compel them to accept a particular settlement of the dispute.

181. An industrial council or conciliation board may decide to refer a dispute to voluntary arbitration if it is unlikely that the dispute will be resolved at these fora. Both parties to the dispute must agree on this course of action. Under section 45, the parties may select a single arbitrator or select an equal number of arbitrators with an industrial umpire or go to the Industrial Court for arbitration. The arbitrator will deliberate upon the evidence presented to him by the parties and if necessary call for further evidence. The arbitrator's decision and award are binding on the parties.

182. When a dispute before an industrial council or a conciliation board in an essential service cannot be settled within 30 days from the date that it was referred, the matter must be reported to the Minister and the dispute referred to compulsory arbitration. An award given under such arbitration is final and binding upon the parties. Under the terms of section 46(1)(b), those industries which provide essential services consist of local authorities and establishments which provide light, power, water, sanitation, passenger transport and fire-fighting services. The Minister is also empowered to classify other operations as essential services, namely the handling of perishable foodstuffs and the supply of petrol or other fuels for use by the services listed above.

(vi) The Industrial Court and the Labour Appeal Court

183. When the Industrial Court was established by the Labour Relations Amendment Act of 1979, it replaced the former Industrial Tribunal and received extended powers. At the time, the newly emerged unions were at first reluctant to participate in the formal labour relations system. But over the years the unions used the Court more frequently. In 1979, for example, the Court heard only four applications. These had increased to 801 in 1985, to 3,533 in 1987 and to 6,051 in 1991.

184. The Industrial Court comprises a president, deputy president and a number of other members as the Minister may from time to time determine (section 17(1)(a)). Section 17A of the 1988 Act established a new Labour Appeal Court that now oversees the Industrial Court. As a division of the Supreme Court for certain specified purposes (section 17(21A)(d)), the Labour Appeal Court can overturn the Industrial Court's decisions. Previously, judgements of the Industrial Court could be the subject of review only, not appeal.

185. Although the Industrial Court has a wide variety of functions, in practice its principal function is to determine disputes where there are allegations that an unfair labour practice has been committed. Under the terms of section 1(1) of the 1991 Act, an unfair labour practice (the definition of which has undergone several changes since its introduction in 1979) means:

1.(1)(a) any act or omission other than a strike or a lockout which has or may have the effect that -

(i) any employee or class of employees is or may be unfairly affected or that his or their employment opportunities or work security is or may be prejudiced or jeopardised thereby;

(ii) the business of any employer or class of employers is or may be unfairly affected or disrupted thereby;

(iii) labour unrest is or may be created or promoted thereby;

(iv) the relationship between employer and employee is or may be detrimentally affected thereby.

186. When a dispute arises concerning an alleged unfair labour practice, the aggrieved party may apply to the Industrial Court for a determination that the conduct complained of constituted an unfair labour practice, and the Court may make such order as it deems reasonable in the circumstances. This may include abstention from the unfair labour practice, reinstatement of an employee or restoration of terms and conditions of employment. In the context of the complaint before the Commission, the principal relevance of this jurisdiction is that it provides the only channel through which workers dismissed following a strike can challenge their dismissal. If it is found to be an unfair labour practice, the Court has the option of ordering reinstatement or compensation.

187. Also relevant to the complaint is the Industrial Court's power to interdict any strike or lockout which is prohibited under section 65 of the LRA. An employer has to give 48 hours' notice to the trade union if he wants to apply for such an interdict. A further limitation is that, where at least ten days' prior notice of the commencement of a strike or lockout has been given, at least five days' notice must then be given if an application is to be made for an interdict restraining parties from instigating, inciting or participating in a strike or lockout. There is no restriction, however, on interdicts which prohibit unlawful conduct, such as sitting in, sleeping in and damage to property.

188. The 1988 Act established a Labour Appeal Court, each division of which consists of a judge of the Supreme Court of South Africa as chairman, and two assessors appointed by the chairman. Its functions are to decide questions of law referred to it by an Industrial Court, and to decide appeals from decisions of the Industrial Courts. A further appeal (except against decisions on questions of fact) lies to the Appellate Division of the Supreme Court. Leave of the Labour Appeal Court or of the Supreme Court is required for such appeals.[13]

189. The evidence given to the Commission indicated that this system is not functioning satisfactorily. The two major problems identified were the long delays involved, and the uncertainty of the outcome.

190. The lengthy nature of the procedures was illustrated by the evidence concerning a strike in May 1985, following which 950 workers were dismissed. The decision of the Industrial Court rejecting an application for reinstatement was pronounced only on 9 September 1987. The matter was then referred to the Supreme Court for review and the decision of the Industrial Court was set aside in 1989. The employer appealed against this decision and the appeal had still not been heard when the Commission concluded its Second Session in South Africa in February 1992, seven years after the strike.

191. As well as the complexity of the procedure, the proliferation of cases and staffing problems contribute to the delays.

192. The members of the Industrial Court do not have the status of judges and are not remunerated as such. It is consequently difficult to attract and retain sufficient members of appropriate calibre. Witnesses identified this as a major cause of the present dissatisfaction. At present the Court consists of seven permanent members and 40 ad hoc members who sit from time to time.

193. Since its inception in 1979 the Industrial Court has had to apply and develop the unfair labour practice concept and the evidence indicated that

there has been and still is a problem of inconsistency of approach. So far little coherent case law has developed and the result is a lack of certainty. It is thus virtually impossible for a trade union to know, if workers are dismissed following a strike, whether the Industrial Court will find that the dismissal is unfair, and if so, whether it will order compensation rather than reinstatement.

194. Evidence was also given that the Labour Appeal Court established in 1988 was not considered to be functioning satisfactorily. Problems identified by one witness were:

- that the two-tier appeal structure (Labour Appeal Court - Appellate Division of the Supreme Court) causes great delays;
- that the judges are overworked and they and the assessors poorly remunerated;
- that neither judges nor assessors as presently chosen typically have specialised experience of labour law; and
- that the existence of six Divisions of the Court can potentially lead to conflicting decisions.

It was suggested in particular by one witness that the assessors, rather than being lawyers as at present, should be chosen from employer or trade union background.

195. The Commission learnt that proposals for the restructuring of the Labour Appeal Court were under examination. The NMC had considered the matter and put forward its ideas in the context of proposals for a consolidated Labour Relations Act; reference was also made to discussions on interim legislation to restructure the Court, but no more precise information was made available.

(vii) The National Manpower Commission

196. Provision is made for the NMC by sections 2A-2D of the LRA, which were introduced by the 1979 amendments. It is composed of a chairman, a deputy chairman and other members, appointed by the Minister of Manpower to represent the interests of the State, employers and workers. Its function is to make investigations and submit recommendations to the Minister concerning all labour matters, including labour policy, as well as any connected administrative matters which are referred to it by the Minister.

197. The evidence before the Commission dealt with the composition and work of the NMC since 1988. It is composed of persons appointed in their personal capacities, not as representatives of organisations, and the members appointed in April 1988 consisted of eight employer and eight worker representatives, two independent persons and the Chairman. The Chairman, who gave evidence, expressed the view that the NMC was not properly representative of the major players in the labour arena during the period 1988-90, adding that COSATU and NACTU had declined invitations to be represented during those years.

198. However, after the negotiations leading to the signature of the Laboria Minute in September 1990, and the passage of the 1991 amendments to the LRA, COSATU joined the NMC in January 1991 and took part in its investigations on a number of issues examined in this report, including the

redrafting of the LRA, the situation of farm workers and domestic workers, the Labour Appeal Court and the restructuring of the NMC itself.

199. It was dissatisfaction with what it saw as the lack of progress on this last issue that led COSATU to withdraw from the NMC in September 1991. Agreement had been reached in the negotiations leading to the Laboria Minute that "such restructuring shall ensure that the NMC is broadly representative of the major actors in the labour relations arena, and to this end COSATU and NACTU agree to participate in a restructured NMC after consultation with the Minister, the NMC and SACCOLA".

200. The recommendations of the NMC concerning its restructuring had been published in July 1991. One of the issues dealt with was the submission of the NMC's proposals to Parliament. A majority considered that this should be done if the NMC's recommendations were not accepted by the Minister.

201. In a letter to COSATU dated 10 September 1991, the then Minister expressed the view that in the light of the far-reaching consequences of the NMC's recommendations on this point and their possible effect on the constitutional process now taking place and the law-making process in general, the appropriate forum to discuss the restructuring of advisory bodies such as the NMC would be CODESA. The Minister went on to make proposals for a meeting with the NMC and other interested parties to explain his reactions to its recommendations and to set out a tentative timetable for completing the restructuring of the NMC. COSATU's reaction was to withdraw from the NMC, giving as reasons that the Minister was "dragging his feet" on the restructuring and that they did not feel that the issue should be dealt with by CODESA. A further motive was the fact that the Government had persistently failed to implement recommendations agreed between the major parties in the NMC, and there seemed to be no point in continuing endless discussions whose results were disregarded by the Government. The Chairman of the NMC, while recognising that there were ambiguities in the Minister's letter, considered COSATU's decision over-hasty, and that it had done more damage than good. He considered that there had been a degree of misunderstanding and that the matter could have been sorted out.

202. The result has been that the NMC, although its mandate was formally renewed until 31 March 1992, has been in abeyance, and in particular further work on restructuring has been blocked, since it has not been possible to get consensus on a response to the Minister's views on the NMC's proposals of July 1991.

203. This stalemate has not been helped by the fact that the then Minister of Manpower was transferred to another position in November 1991, the post being filled by an interim Minister until 21 January 1992. At the time of the Commission's visit, therefore, the new Minister had only assumed his office some three weeks earlier. There had therefore been inevitable delays in making progress on a number of important issues.

204. For a full understanding of certain of the issues which the Commission was called on to examine, it finds it necessary to refer to evidence given concerning the respective roles of the NMC and the Department of Manpower, which is responsible for advising the Minister on the reports and recommendations of the NMC.

205. The Chairman of the NMC stated that its reports had not always met with a favourable response from the Department. He felt that this was partly because the different roles of the two were not spelt out, and the Department may have felt that the NMC was trespassing on its field of action. He considered that the solution of the problem would be for the Department to be

involved more closely in the activities of the NMC and its committees, so that it would play an active part from the outset rather than attending in a purely passive role as at present. This would better enable the NMC to seek a consensus which took account of the Department's views.

206. Another witness stated that there was serious friction between the NMC and the Department because the latter, under its present Director-General, considered that its own views and advice should invariably take precedence over the recommendations of the NMC, and disregarded or modified them as it thought fit. Two witnesses acknowledged that, as at present composed, the Department of Manpower's role in this respect was regarded as "reactionary".

Notes

[1] See de Kock, Industrial Laws of South Africa, 2nd ed., 1984.

[2] Section 7 of the Black Labour Relations Regulation Act, No. 48, of 1953.

[3] See de Kock, op. cit., at p. 654.

[4] South African Labour Bulletin, Vol. 5, No. 2, Aug. 1979.

[5] This definition was replaced by a more detailed one in section 1(c) of the Industrial Conciliation Amendment Act No. 95 of 1980, and further amended in 1982, 1988 and 1991.

[6] Department of Manpower, South Africa: "Return in regard to trade unions as at 31 October 1981" (mimeographed).

[7] See in the preamble to the 1986 Annual Report of the South African National Manpower Commission.

[8] Andrew Levy and Associates (Pty) Ltd., Annual report on labour relations in South Africa, 1991-92.

[9] Dept. of Manpower Annual Report, 1990, Dept. of Manpower, Pretoria.

[10] S. Pityana et al., Shop steward survey of COSATU affiliates, Community Agency for Social Enquiry, Johannesburg, 1992.

[11] Weekly Mail, 7 to 14 Feb. 1992.

[12] A publication of SACCOLA, 1990.

[13] Sections 17A to 17C.

PART IV: Examination by the Commission of the case

CHAPTER 7

THE RIGHT TO ESTABLISH AND JOIN TRADE UNIONS

207. The fundamental right to form and join trade unions is expressed in Article 2 of ILO Convention No. 87 which reads: "Workers and employers, without distinction whatsover, shall have the right to establish and, subject only to the rules of the organisation concerned, to join organisations of their own choosing without previous authorisation." Article 3 provides that these organisations shall have the right to draw up their constitutions and rules in full freedom. The various concepts contained in the language of these Articles and their implications have been developed by the supervisory bodies of the ILO in carrying out the responsibilities entrusted to them.[1]

(a) Content of constitutions of trade unions

208. Section 4 of the Labour Relations Act (LRA)[2] lays down requirements for the registration of occupational organisations. An application for registration must be accompanied by copies of the organisation's constitution, and section 8(1) of the LRA sets out 18 matters that should be covered in the constitution:

> 8. Constitution of trade unions and employers' organizations
>
> (1) The constitution of every registered trade union shall contain provisions not inconsistent with this section in regard to the following matters -
>
> (a) the qualifications for membership and the membership fees and other moneys (if any) to be paid by members or the method of determining such fees;
>
> (b) the circumstances and the manner in which the membership of a member may be terminated;
>
> (c) the manner in which a member may terminate his membership;
>
> (d) the circumstances in which a member shall cease to be entitled to the benefits of membership;
>
> (e) the body or bodies to which a member shall have the right to appeal against a decision given on any matter referred to in paragraph (b) or (d) by a committee or other similar body having the power to give such a decision in terms of the constitution and the manner in which such appeal shall be prosecuted and determined;
>
> (f) the acquisition and control of property;
>
> (g) the alteration of the constitution;
>
> (h) the calling and conduct of meetings of members or representatives of members and the keeping of minutes of the proceedings at such meetings;

(i) the election of representatives on any industrial council or conciliation board, except in the case of the associations referred to in subsection (3) of section 2;

(j) the purposes for which its funds may be used;

(k) the procedure to be followed in the nomination of candidates for election as office-bearers;

(l) the taking of a ballot of members for the election of office-bearers whenever more than one candidate has been duly nominated for any office: Provided that if the registrar is of opinion that the taking of a ballot of members is not practicable he may approve of the substitution of a provision for the taking of a ballot of representatives of members or of the members of any body established in terms of the constitution;

(m) the procedure to be followed in the appointment or election of officials;

(n) the powers and duties of office-bearers and officials;

(o) the circumstances and the manner in which office-bearers and officials may be removed from office: Provided that, in addition to any other provision made in terms of this paragraph, provision shall be made for the taking of a ballot, at the written request of a specified number or proportion of the members, to determine whether an office-bearer or official names in the request shall be removed from office, or if an office-bearer or elected official has been removed from office, whether he shall be reinstated;

(p) the manner in which a ballot shall be conducted;

(q) the winding-up of the union; and

(r) any other prescribed matter.

209. Section 8(4)(a)(iv) of the LRA contains provisions concerning further optional contents of organisations' constitutions:

> 8(4)(a) In addition to the matters referred to in subsections (1) and (2) and subject to the provisions of this section, the constitution of a registered trade union or employers' organization may provide for any one or more of the following matters -
>
> (i) the benefits to which members are or may become entitled;
>
> (ii) the fines, levies and forfeitures to which members are or may become liable for breaches of the constitution;
>
> (iii) the establishment and the powers, duties and functions of an executive committee and other committees;
>
> (iv) any other matter which in the opinion of the registrar is suitable to be dealt with in the constitution of a trade union or employers' organization, as the case may be.

210. For trade unions which choose not to register, section 4A provides as follows:

4A(1) Any trade union referred to in section 4(1)(a) which does not apply for registration under section 4 within three months after the date as from which it may apply for such registration in terms of the said section 4(1)(a) shall at the expiry of the said three months submit to the registrar a copy of its constitution and furnish him with its head office address and the names of its office-bearers and officials.

(2) Any trade union which contravenes the provisions of subsection (1) shall be guilty of an offence.

(3) The provisions of this section shall mutatis mutandis apply to employers' organisations.

(b) Registration of trade unions

211. As indicated above, under section 4 of the LRA, registration is not compulsory. It does, however, confer important benefits or advantages on a union or employers' organisation. For example, only registered unions can become parties to industrial councils and thus use the statutory bargaining structures (section 18); registration confers legal personality (section 5(1)); liability is limited for members, officers and officials of registered unions (section 5(3)); they are likewise indemnified against civil liability for strike action (section 79(1)); they can benefit from check-off facilities through stop orders for the payment of union dues and if the employer refuses can apply to the Minister for an order compelling compliance (section 78); unregistered unions may benefit from check-off facilities if the Minister consents thereto (section 78(1C)); unregistered unions' collective bargaining agreements are not enforceable in any court of law unless they comply with certain statutory conditions.

212. COSATU referred to various provisions of the LRA giving the Industrial Registrar wide discretionary powers in deciding on an application for registration. It argued that they amounted to requiring prior authorisation for the establishment of a union contrary to ILO principles.

213. In the first place, COSATU objected to the Registrar's wide discretion, under section 4(5)(a)(ii) and (iii), not to register a union unless he or she was satisfied that:

4(5)(a)(ii) the constitution of the applicant union is consistent with this Act and does not contain provisions which are contrary to the provisions of any law or are calculated to hinder the attainment of the objects of any law or are unreasonable in relation to the members or the public; and

(iii) the union has not been formed for the purpose of evading the provisions of any law or is not affiliated to any politcal party within the meaning of section 8(7).

214. In evidence, the Registrar stated that since his appointment on 1 August 1988 he had not had cause to refuse any registration under section 4(5)(a)(ii) or (iii).

215. Secondly, COSATU argued that the objection (or "knockout") provision in section 4 of the LRA allowed the Registrar to refuse the registration of a trade union for an area and interests in respect of which an existing union

was already sufficiently representative. The relevant provisions of section 4 read:

> 4(2)(a) As soon as practicable -
>
> (i) after the commencement of this Act, in the case of an application deemed to have been made under subsection (1); or
>
> (ii) after he has received it, in the case of an application lodged in terms of subsection (1),
>
> the registrar shall cause to be published in the Gazette a notice containing such particulars of the application as he deems necessary and inviting any registered trade union which objects to the application to lodge its objection in the manner specified in the notice within one month of the date of such notice.
>
> (b) Such objection shall state the grounds of the objection and shall be lodged in the manner specified in the relevant notice published under paragraph (a).
>
> ...
>
> 4(3)(b) If after considering any objections lodged and any representations made within the periods prescribed, any further information furnished within the period fixed by him and such additional matters as he deems relevant, the registrar is satisfied that any registered union which has so lodged an objection is sufficiently representative in the whole of the area in respect of which the applicant union seeks registration or in any part thereof, of the whole of the interests in respect of which it seeks registration, or of any part thereof, he may refuse to register the applicant union or, subject to the provisions of this section, register the applicant union in respect of such area and interests as in his opinion are served by such union and in respect of which such registered or other union is not in his opinion sufficiently representative.

216. As the words "sufficiently representative" were not defined in the Act, COSATU argued that the Registrar had an excessive discretion in this respect. It submitted that this so-called "knockout" provision depended on an unclear and arbitrary assessment of the term "sufficiently representative", and thus infringed the principles of freedom of association by denying workers the right to establish and join unions of their choice without previous authorisation.

217. Moreover, under section 4(3) of the LRA, COSATU submitted that the Registrar had a discretion not to proceed with registration, even if all the requirements were met. Even though the Registrar's refusal of registration could be appealed to the Minister of Manpower (section 16(4)) and thereafter to the Supreme Court (section 16(5)), COSATU argued that he or she should not have such wide discretion not to register because, although registration was not compulsory, it had important consequences for an organisation and conferred important benefits on the organisation and its members.

218. The representative of the Minister of Manpower stated that, in handling appeals against refusal of registration of trade unions, the policy of the Minister was to look at the objector's representative position and to have regard to the areas, interests, undertaking, industry, trade or occupation in the case of trade unions.

219. COSATU called for the total abolition of this system of registration and its replacement by a system of certification, since the present system served no purpose whatsoever and was flawed by the wide discretions referred to above. If the current system was to remain, COSATU suggested amendment so that the discretionary nature of the Registrar's powers was curtailed and extraneous factors such as race could not be taken into account.

220. The Government, in its written reply, pointed out that COSATU had not supplied any examples of abuse by the Registrar in exercising his discretions. It added that it was inappropriate to deal in any greater detail with this issue since the LRA was in the process of being amended.

221. During the hearings, the Government conceded, in relation to sections 4 to 14 of the Act, that it was common cause between all parties that the present system of registration was cumbersome and outmoded. It suggested that the parties arrive at a consensus as to a simple and efficacious manner in which trade unions could be registered and controlled so as not to impinge on the rights of freedom of association.

222. SACCOLA, in its written submissions, agreed that the registration process for both employers' organisations and trade unions should be simplified.

(c) Racially constituted unions

223. In the original COSATU complaint, it was alleged that the new section 4(4)(c) introduced in 1988 was designed to favour the registration of, and to protect, unions open only to Whites. The new provision did this by elevating race to the level of "an interest" which was a factor to be taken into account in the Registrar's consideration of an application to register a union and in examining any objections to that application. The 1991 Act repealed section 4(4)(c). COSATU argued, however, that race could still be taken into account by the Registrar implicitly by his regarding eligibility for membership of the applicant union as determining the "interest" on which to assess objecting unions. He could thus use the section's "knockout" provision - described above - to refuse registration of legitimately formed workers' organisations.

224. The Registrar in evidence gave statistical information on the effects of the 1988 amendments. In the period from November 1981 until the 1988 Act came into force, 11 unions had been registered in respect of a specific racial group: eight Black, three White. In only one case - the Blanke Werknemersunie - had objections been received to its application for registration from four unions in the banking and financial sector based on the ground that its registration would disturb labour relations since it would only serve the interests of Whites; the applicant decided to omit the banking industry from its application so that registration could proceed. During the period when the section was in force, four unions were registered for a specific racial group, all Black. In one case - the General Industries Workers' Union of South Africa - an objection was lodged, but not upheld as the objector's own constitution limited membership to Whites and Coloureds. Since the 1991 Act had repealed the section, only four applications had been received, one of which had been granted to a Blacks-only union and one to a Coloureds-only union. There had been an objection to the former and, none of the objecting unions being sufficiently representative, the applicant was accorded registration as applied for. Two applications from Whites-only unions, in respect of which objections had been lodged, were pending.

According to the Registrar, no action had been taken in relation to unions affected by section 4(4)(c) after the 1991 Act repealed that section.

225. COSATU argued that, although the courts had held that "interests" meant industrial and not social, religious or political interests,[3] there was nothing in the Act which precluded the registration of racial or sectional organisations. COSATU referred to a court decision expressing the view that race constituted an interest for the purpose of registration,[4] but noted that it was subsequently confined to situations where the racial group had common industrial interests which differed from those of employees of another race.[5]

226. On this point, the Registrar stated that he had, on no occasion since his appointment, refused registration using the criterion of "sufficiently representative" with reference to race or political persuasion. To be successful, an objector had to represent 50 per cent plus one worker in the occupation, undertaking, industry or trade applied for and in the area concerned. He applied this criterion to interest in the sense of "occupation", without regard to race or political persuasion so that if the objecting union could not prove that it had more members in good standing in that particular occupation than the applicant, the objection would fall and registration proceed. However, if an application satisfied that criterion there was nothing to stop the applicant union, of its own accord in its constitution, limiting its activities to a particular racial group. Race therefore was only a secondary consideration. When questioned as to what he meant by secondary consideration, the Registrar admitted that he merely applied the Act's procedure without following any policy and that he would grant registration to a racially based union if there were no objections. If necessary, he would turn for legal advice to the State Legal Adviser or perhaps consider the advice of ministry staff. He explained that he had no legal training. He maintained that he fulfilled an independent role. When asked about his views on a new, simplified registration system, he stated that the NMC was looking at that matter. When it was put to him that the current registration provisions were useless now, he answered that they were still in the statute.

227. The representative of the Minister of Manpower saw the system of registration as one of the problem areas of the LRA requiring attention. He recognised that there was nothing in the Act to suggest that sectional or racial organisations could not be registered and stated that the Ministry's policy was to allow members of trade unions to decide for themselves on the matter of membership, provided that they met the sufficiently representative criterion for registration. He described the approach as one allowing the changing circumstances in a particular undertaking, industry, trade or occupation to move a union to open up its membership to all workers. This would allow evolution to a position where race would not be a factor in determining membership.

228. The Commission asked whether there should be a positive duty on the Registrar to deregister those racially based unions which had been granted registration. Referring to the duty, under section 7 of the LRA, of the Registrar to vary the scope of registration certificates, the representative of COSATU considered that the Registrar was already responsible for verifying changes in representativity and that deregistration should proceed upon the lodging of an application in respect of racially based unions. A trade union witness felt that they should be left to phase themselves out as a transitional measure, recognising at the same time that the constitution of a new South Africa would outlaw racism in all its forms. He felt that, through pressure for voluntary change of their constitutions, the existing Whites-only unions would see the importance of opening up their membership. The

representative of the Minister of Manpower stated that the Ministry would not lightly tamper with existing rights until there had been thorough consultation. He said that this was a delicate issue best left to evolve and to a decision of the unions themselves to open up their membership in the light of the changing circumstances of South Africa. A decade earlier there had been 67 non-racial unions out of 200; today there were 126 out of 193 registered unions.

229. SACCOLA, in its written submissions, agreed that the registration process for both employers' organisations and trade unions should be non-racial.

(d) Unions with mixed public/private sector membership

230. COSATU argued that section 2(3)(b) of the LRA restricted the right of workers to establish and join organisations of their own choice by preventing the registration of unions with members in both the public and private sectors. An amendment adopted in 1991, which would allow the registration of such mixed unions, had not yet been brought into force.

231. A witness from a public sector union not affiliated to COSATU referred to the following difficulty facing some of its members as a result of this limitation. The Government had in recent years implemented a policy of transferring certain services from the public to the private sector with the result that the employees ceased to be public servants and became subject to the LRA. None the less, in many cases they wished to remain members of the public sector union. However, since the union could not register under the Act once it had members from the private sector, it was not in a position to represent the interests of these workers effectively.

232. For the rest, questions affecting workers in the public sector are dealt with in Chapter 12(a)(ii).

(e) Cancellation of registrations and dissolution of unions

233. COSATU referred to sections 13 and 14 of the LRA which provide:

> 13. Winding up of trade unions or employers' organizations
>
> (1) A registered trade union or employers' organization shall be wound up -
>
> (a) if a resolution for the winding up of the union or organization has been adopted in terms of its constitution; or
>
> (b) if the union or organization is unable to continue to function for any reason which in the opinion of the Registrar cannot be remedied under subsection (1) of section 12.
>
> (2) When a registered trade union or employers' organization is to be wound up, the Registrar may -
>
> (a) to the extent that he considers the provisions of the constitution in regard to winding-up to be inadequate;

(b) if he is satisfied that it is not possible to give effect to the provisions of the constitution relating to winding up,

issue such directions as he deems necessary to ensure that the union or organization is wound up with due regard to the interests of the parties concerned, and may for this purpose appoint any person as liquidator subject to such conditions as he may determine. [...]

(4) If after all liabilities and obligations of the union or organization have been discharged there remain assets which cannot be disposed of in terms of the constitution of the union or organization, or in terms of a resolution of the majority of the members of the union or organization who were in good standing when any such resolution was adopted, the Registrar may in his discretion at any time and from time to time direct that any such assets be liquidated and that the moneys realized or any portion thereof, be paid to any other registered trade union or employers' organization, as the case may be, which is registered in respect of interests which in the opinion of the Registrar are wholly or partly the same as the whole or part of the interests in respect of which the union or organization which is being wound up was registered. Any portion of such moneys which has not been so disposed of within two years from the date on which the liquidation was completed shall be paid into the State Revenue Fund.

14. Cancellation of registration of trade union or employers' organization

(1) Whenever the Registrar has reason to believe that a registered trade union or employers' organization has been wound up or is not functioning as a trade union or employers' organization, he shall publish in the Gazette and send to the union or organization by registered post a notice that at the expiry of the period mentioned in that notice, not being less than 30 days from the date of that notice, the registration of the trade union or employers' organization mentioned therein will, unless cause be shown to the contrary, be cancelled.

(2) At the expiry of the period mentioned in any notice such as is referred to in subsection (1), the Registrar shall, unless cause to the contrary to his satisfaction has previously been shown, cancel the registration of the union or organization, and shall publish a notice to that effect in the Gazette.

234. By virtue of section 16, an appeal lies to the Minister against a decision of the Registrar to cancel a registration, and thereafter to the Supreme Court. COSATU challenged, however, the absence of a right of appeal against a winding-up order issued by virtue of section 13. It submitted that the Registrar had powers under these sections which were too wide.

235. In evidence, the Registrar stated that he had never made a winding-up order under section 13. For section 14 cancellations he gave the following figures: 1988 - 6; 1989 - 9; 1990 - 12; and 1991 - 19. Details of these 46 cancellations showed that 19 were the result of the union's own resolution to cease activities, 14 were due to mergers with other unions, six were based on non-compliance with the requirements of the Act, and seven were the result of peculiar circumstances (such as: the inability to locate anyone belonging to the union, an office-bearer informing the Registrar that the union could no longer function for lack of members or funds, the union being declared bankrupt and its members resigning to join other unions). Where he had reason to believe that a trade union was no longer functioning, every effort was made to trace the last known office-bearers, and where

unsuccessful, a notice of his intention to cancel the registration would then be published in the Gazette.

236. The representative of the Minister of Manpower stated that, in handling appeals against cancellations of registrations of trade unions, the policy of the Minister was to require proof that the trade union had been wound up. Where a trade union was not functioning, the Regional Director of Manpower concerned had to submit a comprehensive report substantiating the position. Care was taken to ensure that any winding up in terms of section 13 had taken place only after the Registrar had made sure that there was no other avenue open to keep the trade union alive. He emphasised that cancellations were appealable to the Supreme Court.

237. SACCOLA, in its written submissions, stated that, to its knowledge, this matter had never been raised before. It added that, should a system of registration as discussed above be adopted, problems relating to the deregistration of a union or employers' organisation would presumably be of less relevance. Nevertheless, it envisaged that a deregistration procedure would have to be provided for. Such a procedure should contain safeguards against abuse and subject any decision taken to the full control of an appropriate judicial body.

238. The conclusions of the Commission on the matters dealt with in this chapter are contained in paragraphs 580 to 599 below.

Notes

[1] For further details, see Chapter 1, footnotes 7, 8 and 9.

[2] 4. Registration of trade unions and employers' organizations

(1) (a) Every trade union which has been established before the commencement of this Act and which at that commencement is not deemed to be registered under this Act may, not earlier than three months after the date on which it was established, and every trade union which is established after the commencement of this Act may, not earlier than three months after the date on which it was established, apply in the prescribed form and manner, to the Registrar for registration.

(b) Every such application shall be accompanied by three copies of the constitution of the applicant union (duly authenticated by signature of the chairman and the secretary of the applicant union) and by such other documents or information as may be prescribed.

(c) Every application made before the commencement of this Act by any trade union for registration under the Industrial Conciliation Act, 1937 (Act No. 36 of 1937), and not disposed of at that commencement, shall be deemed to have been made under this subsection.

(d) Any union applying for registration shall furnish the Registrar with any further information he may require, within the period fixed by him.

[3] MAWU & Others v. Minister of Manpower & Others (1953) (3) SA 238.

[4] Natal Liquor & Catering Trade Union v. Minister of Manpower & Others (1983) (3) SA 819.

[5] Metal & Allied Workers' Union v. Minister of Manpower (1983) (3) SA 238.

CHAPTER 8

THE RIGHT OF TRADE UNIONS TO FUNCTION FREELY

239. The right of trade unions to function freely is expressed in Article 3 of ILO Convention No. 87. After listing the rights which workers' organisations should have so as to be able to fulfil their functions, this Article provides that "the public authorities shall refrain from any interference which would restrict this right or impede the lawful exercise thereof.[1] Another ILO text, the 1970 resolution on trade union rights and their relation to civil liberties of the International Labour Conference, also specifies certain rights that should be available to workers and their organisations for them to operate effectively. This resolution states that, without civil liberties such as freedom of opinion and expression and freedom of assembly, the concept of trade union rights becomes meaningless.

(a) Executive powers of interference in elections and internal affairs

240. Section 12(3) of the Labour Relations Act (LRA) empowers the Industrial Registrar to conduct an inquiry if he has reason to believe that:

(a) any material irregularity has occurred in connection with any election held by a registered trade union;

(b) any registered trade union or any official, office bearer, committee or other body of the union has failed to observe any provision of the constitution or has acted unlawfully, unreasonably or in a manner that has caused serious dissatisfaction amongst a substantial number of the members in good standing.

For this purpose, the Registrar may enter premises to make an inspection, subpoena witnesses and retain books and documents for examination. These provisions also apply to registered trade union federations.

241. After the inquiry the Registrar makes recommendations to the Minister of Manpower. These may include a recommendation that new elections be held in respect of the post, office, committee or body concerned. After considering any representations, which he may invite from the union or federation concerned, the Minister may direct that effect be given to some or all of the Registrar's recommendations.

242. There is no right of appeal against any such direction by the Minister and the only possible remedy is the institution of review proceedings. In this regard the Government emphasised that the right of review was not with substance. It stated that grounds of review at common law existed to verify whether acts were *mala fide* or carried out dishonestly or for ulterior reasons or were so grossly unreasonable as to be inexplicable[2] and that gross unreasonableness had in fact been frequently used by the courts in cases involving discretionary powers.

243. Asked to provide examples illustrating the basis on which he exercises these powers, the Registrar stated that since he took office in 1988 one allegation pertaining to an irregularity occurring in connection with an election had been reported to him, but that it was not substantiated through

the inquiry. Consequently, no action was taken. No other evidence was given of the use of these powers.

244. COSATU also referred to legislative provisions which, it argued, allowed for disqualification of persons from trade union office on grounds of their political beliefs or affiliation. Thus, section 78(2) of the LRA, which guaranteed the right of employees to become members of a trade union, was made subject to the provisions of the Internal Security Act. COSATU alleged that this Act and similar legislation had been used to prevent persons of certain political persuasions from being members of or holding office in trade unions, and referred to two complaints against South Africa in this regard, both of which had been upheld in 1965.[3]

245. The Government responded that COSATU had not mentioned any instances of anyone being disqualified from trade union office on the grounds of their political beliefs or affiliations since February 1990. It added that, with the unbanning of political parties and institutions which had before that date been banned, the relevant provisions of the Internal Security Act had to a large extent become a dead letter.

246. COSATU further referred to section 12(1) of the LRA, which provides as follows:

> 12(1) If at any time the Registrar has reason to believe that any provision of the constitution of a registered trade union, employers' organization or federation has not been observed, and that as a result of such non-observance the union, organization or federation is unable to function in accordance with its constitution due, either wholly or in part, to -
>
> (a) the non-existence of its executive body;
>
> (b) the failure to fill a vacancy in accordance with the requirements of the constitution; or
>
> (c) any other circumstances arising from the non-observance of the requirements of the constitution,
>
> the Registrar may, if in his opinion a substantial number of the members desire that such union, organization or federation should continue to function, issue such instructions as he may deem necessary in order to place the union, organization or federation in the same position, as nearly as may be, as if the non-observance of the requirements of the constitution had not taken place, and in issuing any such instructions the Registrar shall prescribe a procedure which as nearly as practicable conforms to that prescribed in the constitution of the union, organization or federation, and the Registrar may act under this subsection whether or not the constitution of the union, organization or federation concerned contains provisions which confer similar powers on him.

247. As in the case of section 12(3) there is no right of appeal against decisions of the Registrar under this provision.

248. The Registrar in evidence referred to three cases in which it had been necessary for him to act in terms of section 12(1) of the LRA as the unions were unable to function in accordance with their constitutions owing to the non-existence of their executive bodies. He had requested the secretaries of the unions to furnish him with names of members who were prepared to serve on an interim committee to continue the affairs of the unions until new

executive bodies could be elected not later than a specified date. Two of the trade unions were now functioning in accordance with their constitutions with new executive bodies. The third union was still operating with the interim committee.

249. SACCOLA, in its written submissions, noted that the provisions of section 12 had caused little, if any, controversy in the past. It stated that there had been one or two instances where, due to internal rifts and splits, unions had not been able to act in terms of their constitutions. One should therefore not oppose a procedure which catered for these exceptional situations provided that it contained adequate safeguards against abuse, including full control by the appropriate judicial body.

250. COSATU submitted that section 11(2) gave the Registrar power to require a union to provide him with information and explanations additional to that which has to be provided in terms of the Act. Thus, while the LRA required a union to provide once a year particulars of the total number of its members and of those who were not in good standing, section 11(2)(b) empowered the Registrar to demand such information at any other date, and section 11(2)(d) empowered him to demand an explanation of any matter relating to this information, as well as of any matter relating to the union's accounts and auditor's report, which had to be forwarded to the Registrar annually.

251. Asked about the exercise of these powers, the Registrar referred to the following cases as examples:

- where auditors could not verify certain securities;
- where inadequate accounting controls over cash collections;
- where no books of account available in respect of a branch;
- where the union's constitution regarding payment of subscription fees not applied;
- where inadequate records maintained of allocations to regions and relief aid, no stocktaking of T-shirts; and
- where financial records in respect of certain regions and branches were not furnished to the auditor.

(b) Legislative regulation of financial affairs

(i) Union dues

252. The provisions of the LRA concerning the collection of union dues by means of deductions from wages by the employer, known in South Africa as stop orders, differ in cases of registered and unregistered unions.

253. For registered unions, section 78(1B) provides that, where an employer refuses to operate a stop-order system for the members of a registered trade union, the Minister may, on application by the trade union, compel the employer to implement such a system.

254. The evidence given before the Commission did not, however, provide any instances of recourse to this provision and indicated rather that

provision for stop orders is normally included in recognition agreements between unions and employers.

255. For unregistered unions, on the other hand, section 78(1C) of the LRA prohibits an employer from operating stop orders unless the Minister has approved them.

256. The representative of the Minister of Manpower, questioned about the Minister's policy in exercising this power, indicated that the approach was to see that the basic provisions of the Act had been complied with, such as that the Registrar had been furnished with a copy of the union's constitution and the names and addresses of its office-bearers and officials; that its head office was situated in the Republic of South Africa; that proper records were kept; and that the union was sufficiently representative of the employees in the employ of the employer applying for approval. The Registrar, for his part, stated that the Minister regularly approved such applications, provided that the union had complied with the provisions of the LRA relating to unregistered unions.

257. Evidence was given before the Commission of the problems facing a union when it was not the beneficiary of a stop order or other facilities to enable it to collect union dues. It concerned attempts by the South African Clothing and Textile Workers' Union, a COSATU affiliate, over the years 1987-89, to organise the workers at a large textile company and be recognised as their collective bargaining representative. In order to prove that it represented the majority of the employees, the union submitted signed requests for stop orders from the majority of the workforce. The company then required the union to prove that the workers concerned were paid-up members, which, pending the implementation of the stop orders, was not the case. The union therefore conducted a full hand collection exercise at the plant on all shifts, whereupon the company demanded that the union confirm its representativity through monthly hand collections outside the plant while the protracted negotiations for recognition - in which various other issues were raised - continued. The collection by hand of membership fees from each member outside the plant was particularly onerous. The factory was situated at a distant place where there were no convenient facilities like a union office. The company refused the union access to collect the dues within the premises. The shift system in operation compounded the difficulties in arranging collections outside the plant, as did the State of Emergency in operation at the time, under which any congregation of persons was prohibited.

(ii) Other sources of funding

258. COSATU referred to three statutes which, it argued, affected the ability of organisations such as trade unions to collect and retain funds.

259. The first was the Fund Raising Act, 1978, which prohibits any person from collecting contributions from the public or from any person or organisation outside South Africa unless authorised to do so by the Director of Fund Raising. Moreover, the Minister may, if he or she deems it to be in the public interest, prohibit the collection of contributions on behalf of any organisation. When such a prohibition is in force, no authority to collect contributions may be granted.

260. The Act provides for a number of exemptions, such as the collection of contributions on behalf of religious bodies, educational institutions and political parties: however there is no exemption in respect of trade unions.

261. The only instance referred to before the Commission of the use of this Act against a trade union concerned an application by the Federation of South African Trade Unions (FOSATU), a predecessor of COSATU, in December 1979, for temporary authority to collect contributions. No decision had been taken on this application by June 1980 when the Minister issued a notice prohibiting all collections of contributions by or on behalf of FOSATU. However, this was challenged in court and set aside on the basis that the Minister should have allowed FOSATU to make representations before reaching a decision.

262. The Affected Organisations Act, 1974, is designed to prohibit the receipt of money from abroad by certain organisations. It does not apply generally but is brought into operation by the State President declaring a particular organisation to be an affected organisation. Similarly, the Disclosure of Foreign Funding Act, 1989, whose purpose is to regulate the disclosure of the receipt of money from abroad by or for certain organisations or persons, is brought into operation only when the Registrar of Reporting Organisations declares a particular organisation or person to be "a reporting organisation" or "a reporting person".

263. These Acts provide for the appointment of inspectors with wide-ranging powers of search, entry and seizure, for strict control over the finances of the organisations concerned, including the possible confiscation of funds, and penalties for contravention of their provisions. However, no evidence was led to suggest that they had been used against trade unions.

264. The Government, for its part, pointed out that, while these Acts remained on the statute book, they had not been used against any trade union since February 1990. They were included in the present negotiations taking place at CODESA. It anticipated that the legislation would be dealt with in such a way that any infringement of personal or group freedoms which had resulted from it would be remedied, for trade unions as well as other groupings.

(c) Restrictions on political activities

265. Section 8(6)(c) and (8) of the LRA prohibits both registered and unregistered trade unions from affiliating with any political party. Under section 8(6)(d) and (8), no union may grant financial or other assistance or carry on activities with the object of assisting any political party or any candidate for election to a position in a political party or to a legislative body.

266. COSATU argued that these restrictions were incompatible with ILO principles of freedom of association and should be repealed. The Government submitted that, in the present economic situation, they should form the subject-matter of negotiation between COSATU and other unions and employers with the object of reaching consensus. However, it conceded that, in conformity with the provisions of the CODESA Declaration of Intent and the draft bill of rights proposed by the South African Law Commission, ILO principles should apply and that the relevant clauses of the LRA should be deleted.

267. In evidence, trade union witnesses claimed the right to play a political role, as a legitimate activity in defence of the broad economic and social interests of their members. A witness for COSATU expressed the view that it was impossible to separate the struggle for trade union rights from

the struggle for political emancipation and democracy. Another trade union witness referred to the need for the trade unions to participate in the construction of post-apartheid society, and in particular in overcoming the legacy left by the concentration of economic power and managerial positions in White hands, the poor quality and limited availability of Black education and the very high degree of income inequality.

268. The Government conceded that, during the 1980s, when Black political parties were banned, trade unions had understandably used their rights under the LRA to obtain a political voice. However, it considered that with the unbanning of the ANC and other political parties, and the progress towards a new constitutional and legislative order through CODESA, there was no longer any need or justification for resorting to trade unions as a means of political expression.

269. For the rest, the evidence relating to specific activities of a political nature, and action taken to restrain or suppress them, concerned matters dealt with in the following sections of this chapter and in Chapter 9 on the right to strike.

(d) Impact of security legislation on the exercise of trade union rights

270. COSATU referred to two Acts which had been, and could again be, used to prevent or sanction legitimate trade union activities.

271. The Internal Security Act, 1982, section 54(2) and (3), creates the crimes of subversion and sabotage, punishable with up to 20 years' imprisonment, and 25 years in the case of subversion if the act resulted in violence which the accused should have foreseen. The relevant parts of the provisions concerned read as follows:

> 54(2) Any person who, with intent to [achieve, bring about or promote any constitutional, political, industrial, social or economic aim or change in the Republic] -
>
> .....
>
> (b) cripples, prejudices or interrupts at any place in the Republic any industry or undertaking, or industries or undertakings generally, or the production, supply or distribution of commodities or foodstuffs, or attempts to do so;
>
> (c) interrupts, impedes or endangers at any place in the Republic the manufacture, storage, generation, distribution, rendering or supply of fuel, petroleum products, energy, light, power or water or of sanitary, medical, health, educational, police, fire-fighting, ambulance, postal or telecommunication services or radio or television transmitting, broadcasting or receiving services or any other public service, or attempts to do so;
>
> shall be guilty of the offence of subversion.
>
> (3) Any person who with intent to -
>
> (c) interrupt, impede or endanger at any place in the Republic the manufacture, storage, generation, distribution, rendering or supply

of fuel, petroleum products, energy, light, power or water, or of sanitary, medical, health, educational, police, fire-fighting, ambulance, postal or telecommunication services or radio or television transmitting, broadcasting or receiving services or any other public service;

(e) cripple, prejudice or interrupt at any place in the Republic any industry or undertaking or industries or undertakings generally, or the production, supply or distribution of commodities or foodstuffs;

in the Republic or elsewhere -

(i) commits any act;

(ii) attempts to commit such act;

(iii) conspires with any other person to commit such act or to bring about the commission thereof or to aid in the commission or the bringing about of the commission thereof; or

(iv) incites, instigates, commands, aids, advises, encourages or procures any other person to commit such act,

shall be guilty of the offence of sabotage.

272. COSATU contended that this language was open-ended and ill-defined and was easily capable of affecting activities such as "strikes, boycotts and stay-aways". It added that such prosecutions, while rare, were not unknown. It referred to two cases in which five trade unionists had been charged. They were charged first with subversion as a result of their involvement in a two-day stay-away in 1984. In the second case, they were charged with treason, subversion, alternatively sedition for launching and promoting a rent boycott and/or a consumer boycott and/or a boycott of the industries and/or businesses in Alexandra township near Johannesburg. In its reply, the Government pointed out that this trial had resulted in the acquittal of the accused in the Supreme Court.

273. Other provisions of the Internal Security Act are examined in the section (e) of this Chapter dealing with freedom of assembly.

274. The Public Safety Act, 1953, authorises the State President to declare a state of emergency and to make regulations thereunder. COSATU stated that the State President had made extensive use of these powers during various states of emergency declared between 1985 and 1990, and that many of the regulations made had a direct bearing on the advocacy of strategies traditionally utilised to advance trade union activities and workers' rights. This is an issue examined under section (f) of this chapter dealing with freedom of expression.

275. COSATU also referred to powers introduced by Emergency Regulations on 24 February 1988, under which the Minister of Law and Order could issue an order without prior notice or hearing, prohibiting an organisation from carrying on or performing any of the activities or acts specified in the order. That same day an order was issued restricting COSATU's activities, which was twice renewed and thus remained in force until the State of Emergency lapsed in 1990. It was in the following terms:

> The organization known as Congress of South African Trade Unions is hereby ... prohibited from carrying on or performing activities or acts of the following nature, class or kind namely -

(a) The soliciting of support among members of the public or members of a section of the public (including acts whereby appeals or demands are made to the Government) by way of publicity campaigns for -

  (i) the restoration of an unlawful organization to an organization with a lawful status;

  (ii) the repeal of this order or any other order issued in respect of an organization ...;

  (iii) the release from detention of a prisoner or of prisoners belonging to some or other category of prisoners;

  (iv) the suspension, remission, reduction or non-carrying out of a sentence imposed on a person for the commission of an offence; or

  (v) the abolition of a local authority or of local authorities belonging to some or other category of local authorities.

(b) The fomenting, by way of publicity campaigns, of opposition among members of the public or members of a section of the public to:

  (i) the detention of a person, or of persons belonging to some or other category of persons under the provisions of ... the Internal Security Act ... or ... the Security Emergency Regulations ... or towards the system of detention provided for in any of those provisions;

  (ii) the system of local government as applied in the Republic; or

  (iii) any negotiations or proposed negotiations to which the Government is or is likely to be a party, regarding a new constitutional dispensation for the Republic.

(c) The making of calls on, or encouraging or inciting, members of the public or members of a section of the public by way of publicity campaigns to observe any particular day -

  (i) to commemorate or celebrate the founding of an organization which is an unlawful organization ...;

  (ii) to commemorate or celebrate an event forming part of the history of an organization referred to in sub-paragraph (i);

  (iii) to commemorate or celebrate an incident of riot, public violence or unrest or a protest gathering or protest march which has taken place at some time or other in the Republic, or an event which has occurred in the course of such incident, gathering or march;

  (iv) to commemorate the death of a person or of persons belonging to some or other category of persons; or

  (v) in honour of a prisoner or prisoners belonging to some or other category of prisoners.

(d) The founding, establishment, propagating, financing, organizing, management or operation of alternative structures.

(e) Any interference in or meddling with, or the making of calls by way of publicity campaigns to members of the public or members of a section of the public to interfere in or to meddle with, the affairs or functions of a local authority.

(f) The making of calls on or encouraging or inciting -

   (i) a person doing business in the Republic or with persons in the Republic, to disinvest from the Republic or to otherwise cease doing business in the Republic or with persons in the Republic;

   (ii) the Government of another country, to institute or apply trade, economic or other punitive measures against the Republic or to sever or restrict diplomatic or other relations with the Republic; or

   (iii) a person, organization or body outside the Republic, to terminate, suspend or sever affiliation or ties with a person, organization or body inside the Republic.

(g) The making of arrangements for, or the organizing, propagating or holding of, gatherings at which any of the matters mentioned in this order, is advised, encouraged, propagated, discussed, advocated or promoted.

276. In response, the Government did not deny these allegations. However, it pointed out that not a single instance justifying a complaint relating to the implementation of these Acts since February 1990 had been mentioned by COSATU, nor had they been resorted to in stopping boycotts, stay-aways and strikes since that date. It therefore considered the allegations irrelevant and unfounded. The same applied to the complaints concerning the Emergency Regulations since they were not in operation at the present time. The Government added that the fact that Emergency Regulations could be invoked at any time could hardly be a criticism of the legislation and that throughout the world legislation existed which could be invoked in time of emergency: the need for it was self-evident.

(e) Restrictions on freedom of assembly

277. The Internal Security Act, 1982, contains two provisions which, according to COSATU, have been, and can still be, used to prohibit or restrict trade union meetings.

278. In the first place, under section 46, a magistrate may prohibit any gathering in the district for which he has jurisdiction for a period not exceeding 48 hours if he "has reason to apprehend that the public peace would be seriously endangered" by such a gathering; or he may allow gatherings to be held only "in accordance with such conditions as he may determine".

279. Secondly, under section 46(3) the Minister of Law and Order is empowered to prohibit gatherings, either generally or for specific purposes or in specific places or areas, for such periods as he may determine.

280. From 1976 until March 1991 there was in force a nationwide prohibition on the holding of outdoor gatherings except sports occasions and funerals, and of indoor gatherings whose purpose was, inter alia, "to advise, encourage, instigate or incite except insofar as it is not forbidden in terms

of s. 65 of the LRA [i.e. the provision defining unlawful strikes], any person to leave his work or service or not to return to such work or service or to delay or impede it". Meetings in these prohibited categories could be held with the authorisation of the Minister or of the magistrate in whose district the meeting was to be held.

281. COSATU referred to three cases in 1987 in which trade unions sought unsuccesfully to challenge the refusal by magistrates to allow permission for trade union gatherings to be held. The first two[4] concerned applications for permission to hold a workers' day rally on 1 May and the third an application for permission to hold an open-air meeting for the purpose of convening the annual general meeting of the Natal branch of the union concerned.[5]

282. In addition a witness referred to the banning by the Minister of Law and Order of outdoor meetings planned in the Transvaal in order to launch a "Living Wage Campaign" in March 1987. Similar meetings were, he stated, banned by township councillors in northern Natal and by magistrates in three other districts. An application to the Supreme Court to have the Government order set aside was turned down, and the campaign had to be launched at an indoor meeting.

283. Another witness who gave evidence concerning a prolonged and difficult strike in 1985 referred to the problems caused in the management of the strike and the provision of information to strikers by the prohibition on outdoor meetings; these problems were partly resolved only when a local Catholic church allowed the union to use its hall.

284. In reply, the Government observed that the criticisms appeared to relate to the fact that the legislation still existed, and that the cases and incidents referred to all related to incidents which occurred before February 1990. It added that since that date COSATU as well as other trade union bodies had held numerous meetings throughout the country without hindrance by any state authority.

285. The Government stated moreover that the legislation complained of was presently the subject-matter of debate at the CODESA deliberations, and that it would therefore be incorrect for it to enter into further debate or comment on the subject at this juncture.

286. SACCOLA, in its written submissions, submitted that the right to assemble peacefully, as well as the right to freedom of speech, should be identified in a Bill of Rights justiciable by the Supreme Court. It submitted that the authorities should not have the power to prohibit legitimate trade union gatherings. Referring to the Government's argument that no one - including the State - had in recent years invoked the powers mentioned by COSATU, it added that such an approach did not address the real complaint, namely that the existence of the statutory provisions enabled the State at any time to exercise these powers. It was of little comfort that existing unacceptable provisions were not presently relied upon.

(f) Restrictions on freedom of expression

287. COSATU referred to a number of Acts which it stated had been used to restrict trade unions' freedom of expression, or could be so used. It alleged that these Acts had directly affected trade unions in two principal respects: first, by restricting or preventing the advocacy of political programmes,

doctrines and ideologies which were intended to advance workers' rights; and secondly by restricting or preventing the advocacy of strategies intended to advance the rights of trade unions and workers.

288. The first law referred to was the Publications Act, 1974, under which the distribution and even the possession of a publication which has been declared "undesirable" may be prohibited by a committee appointed by the Directorate of Publications. The grounds on which a publication may be declared undesirable include, inter alia, that it -

(c) brings any section of the inhabitants of the Republic of South Africa into ridicule or contempt;

(d) is harmful to the relations between any sections of the inhabitants of the Republic;

(e) is prejudicial to the safety of the State, the general welfare or the peace and good order.

An appeal from a decision of a committee lies to the Publications Appeal Board which is the final arbiter, there being no right of appeal to the Supreme Court.

289. COSATU contended that trade union publications had on numerous occasions been declared undesirable under these provisions, their distribution thus being prohibited. By way of example it referred to COSATU News No. 2 of November 1986 and No. 4 of May 1987, COSATU Workers' Diary, 1987 and South African Metal Worker, Volume 1, No. 7.

290. COSATU recognised that in the last two years far fewer publications were being censored under the Act, and that previously banned publications were being resubmitted for fresh assessment and being unbanned as a result. However, it argued that as long as the Act remained on the statute book there was nothing to prevent a reversion to the earlier application of the censorship system.

291. In response, the Government stated that, in a society as diverse as that of South Africa, there was full justification for a system of censorship if it was implemented fairly and equitably. It added that since February 1990 numerous publications had been "unbanned", and that COSATU did not quote an instance since that date about which it had a complaint.

292. COSATU also referred to Emergency Regulations issued under the Public Safety Act during the States of Emergency declared between the periods 1985-90, which prohibited the making of "subversive statements". These were defined to include statements encouraging members of the public to take part in boycott actions or to stay away from work or to strike in contravention of the provisions of any law or to support such a stay-away action or strike. Moreover, it was prohibited, unless authorised by a government official, to publish, broadcast or televise information about such actions, strikes or boycotts so as to disclose particulars of the extent to which they had been successful or of the manner in which members of the public had been intimidated, incited or encouraged to take part.

293. COSATU further stated that the security forces, acting in terms of the Emergency Regulations, had seized its publications on a number of occasions: in May 1987, approximately 55,000 copies of COSATU News, No. 4, May 1987; in February 1987, approximately 120,000 copies of a pamphlet "COSATU executive message"; and in May 1987 approximately 150,000 copies of a pamphlet "COSATU under attack - Workers fight back".

294. The Government did not deny these facts. However, it pointed out that the Emergency Regulations were no longer in operation. On this basis, it professed difficulty in understanding the relevance of these complaints.

295. COSATU also referred to section 27B of the Police Act, 1958, which makes it an offence to publish any "untrue matter" in relation to any action by the police without having reasonable grounds for believing it to be true; the onus is on the accused to prove that reasonable grounds existed. Similarly, section 44(1)(f) of the Prisons Act, 1959, contains a corresponding provision concerning the behaviour or experience of a prisoner in prison or the administration of a prison. Such matter may not be published without taking reasonable steps to verify it, and again the onus of proving such steps were taken is on the accused. Finally, COSATU referred to provisions in the Defence Act, 1957, under which in particular it is an offence to publish:

> any statement, comment or rumour relating to any member of the South African Defence Force or any activity of the South African Defence Force ... calculated to prejudice or embarrass the Government in its foreign relations or to alarm or depress members of the public, except where publication thereof has been authorised by the Minister or under his authority.

296. According to COSATU, not only did these provisions impose restrictions at a general level on the right of trade unions to give and to receive information and to express an opinion concerning the conduct of the security forces, but more importantly, they imposed such restrictions in circumstances where trade unions and their members were not infrequently directly affected by the actions of the police, prisons service and Defence Force. This was particularly true at a time when the security laws were being vigorously implemented between 1986 and 1988. The offices of COSATU and its affiliates were frequently raided, publications were seized and banned, and trade unionists were assaulted, restricted and detained. These actions were obviously of vital concern to the unions. Yet, they were inhibited or restricted altogether from publishing the plight of their members and exerting pressure for redress.

297. The Government stated in response that the complaint was aimed not at the implementation of these Acts but at their existence. It pointed out that the Police and Prisons Acts sought to ensure that untrue and unverified information was not transmitted publicly. It found it difficult to understand what criticism COSATU could have against these provisions. As far as the Defence Act was concerned, it observed that this relates to the security of the State and that the justification or otherwise of this kind of legislation could only be tested in the manner in which it was implemented. On this, COSATU had not demonstrated any situation which justified any criticism.

298. It added that although COSATU might in the past have been inhibited as indicated above, no instance of any inhibition since February 1990 had been mentioned: on the contrary, it carried on its activities with impunity.

299. Under the heading of freedom of expression COSATU further referred to controls over broadcasting by the Government and more specifically alleged by the National Party, pursuant to the Radio Act, 1952, and the Broadcasting Act, 1976. According to COSATU, these Acts ensured government control over broadcasting, which had been used to ensure that events and issues which were of importance to the trade union movement had not been broadcast at all, had been given inadequate coverage, had been broadcast out of context or in a way which was distorted or biased in favour of the Government and/or employers.

300. An example of this was given in evidence by one witness who stated that from about 1985, when a State of Emergency was declared, the State used the media and especially television to propagate an anti-COSATU message, and that the effect amongst workers was to turn them off trade unionism.

301. Finally, both the Government and COSATU referred to measures currently being taken to restructure broadcasting in South Africa. COSATU considered the way in which this was being done was unacceptable, to which the Government responded that at the end of the day the validity of these criticisms could only be gauged when the measures were made known.

302. The conclusions of the Commission on the matters dealt with in this chapter are contained in paragraphs 600 to 638 below.

Notes

[1] For further details, see Chapter 1, footnotes 7, 8 and 9.

[2] African Realty Trust v. Johannesburg Municipality (1906) TH 179.

[3] ILO: Official Bulletin, Supplement, Vol. LXIX, No. 1, 1966, Cases Nos. 300 and 311, 85th Report, paras. 107 and 109; see Digest, para. 312.

[4] COSATU v. District Magistrate of Uitenhage, 1987(2) SA 102(SECLD); COSATU v. Minister of Justice, 1987(4) SA 435(D).

[5] Castel N.O. v. Metal and Allied Workers' Union, 1987(4) SA 795(A).

CHAPTER 9

THE RIGHT TO STRIKE

303. While in international law the right to strike is explicitly recognised in certain texts adopted at the international and regional levels, the ILO instruments do not make such a specific reference. Article 3 of Convention No. 87, providing as it does for the right of workers' organisations "to organise their administration and activities and to formulate their programmes", has been the basis on which the supervisory bodies have developed a vast jurisprudence relating to industrial action. In particular they have stated as the basic principle that the right to strike is one of the essential means available to workers and their organisations for the promotion and protection of their economic and social interests. The exercise of this right without hindrance by legislative or other measures has been consistently protected by the ILO principles. At the same time certain restrictions have been seen as acceptable in the circumstances of modern industrial relations.[1]

304. In its complaint of 11 May 1988, COSATU alleged that proposed amendments to the Labour Relations Act (LRA) would abridge the right to strike in four ways: (1) the prerequisites to section 65 for a legal strike (completion of statutory conciliation and a ballot of all union members) would be hard to respect since the previously enforced 60-day cooling-off period could be extended for such further periods as an administrative officer - an inspector of the Department of Manpower - considered appropriate; (2) the section 65 ban on strikes in essential services would be broadened to include strikes in which the strikers were not directly involved in the dispute (sympathy and secondary strikes); (3) likewise it was proposed to include a further section 65 ban on strikes over a dispute which was the same or virtually the same as a dispute which during the previous 12 months gave rise to a strike (intermittent strikes); and (4) strike action would expose participants and their unions to employer claims for damages.

305. Because of the reaction against these amendments, explained in greater detail in Chapter 6, changes were made to the proposed draft both before it was tabled and during its passage through Parliament. The Labour Relations (Amendment) Act (LRAA) which came into force on 1 September 1988 however retained the provisions restricting sympathy and intermittent strikes (defined as unfair labour practices in section 1(1)(h), (l) and (m), respectively), and that enabling employers to claim damages from a union in respect of unlawful strike action unless the union could prove that it had not authorised the strike (section 79(1)). The amendment to the cooling-off provisions was amended prior to enactment so as to allow any extension of the 30-day period only by agreement between the parties to the dispute.

306. The Amendment Act which came into force on 1 May 1991 removed the provisions banning sympathy and intermittent strikes and reverted to a definition of unfair labour practice similar to that existing prior to the 1988 amendment (section 1(1) and (4)). The latter subsection specifically stated that a strike and lockout shall not be regarded as an unfair labour practice. The 1991 changes also removed the ground for objecting to civil liability for strike action: in terms of the amendment, strikes which were preceded by the conciliation procedures in the Act may not form the subject of a temporary restraining order (interim interdict) and the presumption of union authorisation of and thus liability for a strike was removed from section 79(2).

307. Those organisations which responded to the Commission's invitation to submit comments on the original complaint all noted these significant legislative changes, which had taken place in the period between the lodging of the complaint and the Government's consent to the setting up of the Commission.[2] SACCOLA and the IOE on the one hand argued that the effect of the changes removed the basis of the individual objections raised in COSATU's letter of 11 May 1988. The ICFTU on the other hand welcomed the changes, but saw them as something of an interim measure pending the enactment of a comprehensive bill and referred to the restrictive nature of the original LRA.

308. COSATU itself, in the further submissions of 3 December 1991 and its preliminary statement to the Commission's Second Session[3] acknowledged these changes, but welcomed a revised mandate which would give the parties a unique opportunity to identify what still needed to be done to bring South Africa into line with international standards. In these circumstances, any questions relating to the impact of the 1988 amendments limiting strike action need not be dealt with in depth; however, questions concerning the current situation of the right to strike will be dealt with below in the light of the prevailing provisions.

309. In the context of the revised terms of reference, the Commission received a great deal of written and oral evidence on the following aspects of the question of the right to strike under the Labour Relations Act, 1956, as amended: (a) procedural requirements; (b) limitations on aims and practical problems for its exercise; (c) the situation of employees in essential services; (d) picketing; and (e) sanctions against strikers, either in the form of criminal or civil liability or dismissal.

(a) Procedural requirements

310. Strikes are defined in section 1(1) as:

> any one or more of the following acts or omissions by any body or number of persons who are or have been employed either by the same employer or by different employers -
>
> (a) the refusal or failure by them to continue to work (whether the discontinuance is complete or partial) or to resume their work or to accept re-employment or to comply with the terms or conditions of employment applicable to them, or the retardation by them of the progress of work, or the obstruction by them of work; or
>
> (b) the breach or termination by them of their contracts of employment, if -
>
> (i) that refusal, failure, retardation, obstruction, breach or termination is in pursuance of any combination, agreement or understanding between them, whether expressed or not; and
>
> (ii) the purpose of that refusal, failure, retardation, obstruction, breach or termination is to induce to compel any person by whom they or any other persons are or have been employed -
>
> (aa) to agree to or to comply with any demands or proposals concerning terms or conditions of employment or other matters made by or on behalf of them or any of them or any other persons who are or have been employed; or

(bb) to refrain from giving effect to any intention to change terms or conditions of employment, or, if such a change has been made, to restore the terms or conditions to those which existed before the change was made; or

(cc) to employ or to suspend or terminate the employment of any person.

311. Section 65 of the LRA regulates the freedom to strike. The relevant provisions read as follows:

> 65(1) No employee or other person shall instigate a strike or incite any employee to take part or to continue a strike or take part in a strike or in the continuation of a strike and no employer or other person shall instigate a lock-out or incite any employer or other person to take part in or to continue a lock-out or take part in a lock-out or in the continuation of a lock-out -
>
> (a) during the period of the currency of any agreement, award or determination which in terms of this Act is binding on the employees or employers who are or would be concerned in the strike or lock-out and any provision of which deals with the matter giving occasion for the strike or lock-out; or
>
> (b) during the period of one year reckoned from the date of publication of a notice under section 14(2) of the Wage Act, 1957 (Act No. 5 of 1957), in respect of a determination made under that Act, which is binding upon the employees or employers who are or would be concerned in the strike or lock-out, and any provision of which deals with the matter giving occasion for the strike or lock-out; or
>
> (c) if the employees or employers who are or would be concerned in the strike or lock-out, are employees or employers referred to in subsection (1) of section 46; or
>
> (d) when neither paragraph (a) nor paragraph (b) nor paragraph (c) applies -
>
> (i) if there is an industrial council having jurisdiction, unless the matter giving occasion for the strike or lock-out has been considered by that council and until -
>
> (aa) the secretary of the council or a person designated by the council for that purpose, has reported thereon to the Director-General in writing; or
>
> (bb) a period of 30 days reckoned from the date on which the matter was submitted to the council, or such longer period as the council may fix, has expired,
>
> whichever event occurs first; or
>
> (ii) if there is no such council, unless application has been made under section 35 for the establishment of a conciliation board for the consideration of the said matter and until -
>
> (aa) the chairman of the conciliation board or a person designated by the chairman for that purpose, has reported thereon to the Director-General in writing; or

(bb) the period or periods envisaged by section 36(1)(a) have expired,

whichever event occurs first; or

(iii) if it has been decided in terms of section 45 to refer the matter to arbitration pending the settlement of the dispute and the cessation of the arbitration proceedings in terms of subsection (15) of section 45 or the making of an award, whichever event occurs first.

(1A) No employee shall in pursuance of any combination, agreement or understanding, whether expressed or not, with any body or number of persons who are or have been employed by the same employer or by different employers, commit or take part in committing, and no employee or other person shall incite, instigate, command, aid, advise, encourage or procure any employee so to commit or so to take part in committing, any act or omission contemplated in paragraph (a) or (b) of the definition of "strike" in section 1(1) if such act or omission is committed or is to be committed for any purpose other than a purpose referred to in paragraph (ii) of the said definition.

.....

(2) No trade union or employers' organisation and no office-bearer, official or member of such union or organisation shall call or take part in any strike or lock-out by members of the union or organisation -

(a) if the union or organisation, as the case may be, is a party to an industrial council the constitution of which provides that disputes which cannot be settled by the council shall be referred to arbitration; or

(b) in any case where paragraph (a) does not apply, unless the majority of the members of the union or organisation in good standing in the area and in the particular undertaking, industry, trade or occupation in which the strike or lock-out is called or the taking part in the strike or lock-out takes place, have voted by ballot in favour of such action after a report has been made to the Director-General or the period or periods have elapsed, as contemplated in subparagraph (i) or (ii) of paragraph (d) of subsection (1), as the case may be.

(3) Any person who contravenes any of the provisions of subsection (1), (1A), (1B) or (2) shall be guilty of an offence.

312. In summary, the procedural requirements set out above amount to the following:

- the issue giving occasion for the strike must have been referred to the industrial council having jurisdiction over the dispute (empowered to settle such disputes by section 27A) or to a conciliation board (empowered to settle such disputes where no industrial council exists having jurisdiction under section 35) (section 65(1)(d)(i) and (ii));
- the wording of section 27A(1)(a) and section 35(1)(a) thus suggested a requirement that a dispute actually exists;
- each forum requires the fulfilment of the technicality of lodging a certificate stating that, in the steps leading to the dispute and

referral to the industrial council or board, the union or employers' organisation observed all the relevant provisions of their own constitutions (section 27A(1)(b) and section 35(2)(b));

- the dispute must have occurred within the previous 180 days, although provision exists for explaining a late referral (section 27A(1)(d)(i) and section 35(3)(d)(i));
- thereafter the prescribed time period (30 days, unless extended) must elapse (section 65(1)(d)(i)(bb) and (1)(d)(ii)(bb)) unless deadlock is reached and reported before then (section 65(1)(d)(i)(aa) and (1)(d)(ii)(aa));
- at this stage an unregistered union could strike, but registered unions have one further formality to complete, namely a ballot of their whole membership (section 65(2)(b)).

313. COSATU alleged that the technical nature and ambiguous language of these procedural requirements made it difficult to strike legally. Thus strike action became vulnerable to the loss of the immunity from civil liability offered by section 79 of the Act. One of COSATU's witnesses descibed this part of the Act as complicated and extremely difficult to understand. He graphically demonstrated the pitfalls of the procedural requirements by showing the Commission a complicated wall chart designed to illustrate, allegedly in a simplified manner, the stages to be completed under the Act before a legal (sometimes called procedural) strike could take place.

314. Both COSATU's written submissions and the oral evidence led showed that employers were more often than not successful in lodging technical objections to the legality of strikes based on procedural issues.

315. Most examples given concerned challenges over:

- the existence of a dispute;[4]
- the content of the dispute not being the same as that for which conciliation was requested;[5]
- whether the party wishing to take industrial action had itself instituted the statutory procedures;[6]
- the jurisdiction of industrial councils;
- parallel procedures;[7]
- whether the majority voting in favour of a strike ballot had come from all the union's members or just those who actually voted (meaning that abstentions could count as negative votes);
- the wording of ballots;[8]
- the conduct of ballot procedures;[9]
- whether the industrial action amounted to a strike as defined. On this last point, COSATU referred to the celebrated controversy over voluntary overtime bans: a number of court decisions had gone both ways until the matter was finally settled by the Appellate Division of the Supreme Court which held that a ban on voluntary overtime did not amount to a strike as defined.[10]

316. In addition, COSATU led evidence on the time needed to complete all these technicalities before a strike could actually take place. A minimum of five months was apparently required if the union wished to abide by the procedural requirements.

317. SACCOLA, in its written submissions, agreed with COSATU that the language of the LRA was highly technical and ambiguous in many instances. It did not, however, agree that the statutory procedures infringed the right or freedom to strike. It called for the law to distinguish clearly between disputes of interest and disputes of right, a distinction to be determined in the appropriate tripartite forum.

318. The Government replied that the "technical nature" of the provisions of section 65 of the LRA, in so far as they may have caused difficulty or were in any way ambiguous, would, it was hoped, be finally clarified when the new composite Labour Relations Bill was published later in 1992. At that stage all interested parties, including COSATU, would be invited to comment on the Bill. In the meantime, the Government pointed out that members of COSATU and its affiliates had participated in numerous legal strikes without any apparent difficulty, and just as many cases had been taken to the courts by workers as by employers on this subject.

319. Referring to the jurisprudence of the supervisory bodies of the ILO, the Government noted that procedures should not be such as to render striking impossible in practice. It pointed out that there had been much evidence given during the hearings that lawful strikes did take place in the country and that the procedural requirements - all of which were, in its opinion, permissible in terms of ILO standards - did not make strikes impossible in practice.

320. On COSATU's specific point that ballots should relate only to those persons actually voting, the Government considered that the LRA's requirement of a workforce-wide ballot was justified since the question of whether to go on strike should depend on the will of the whole workforce in the particular industry involved, not just those who voted. By not evidencing a will to strike by not voting, a worker indicated that he was not interested in striking.

(b) Limitations on the aims and exercise of strikes

321. As is clear from the definition of strikes in the LRA, set out above, legal strikes are limited to action related to terms and conditions of employment and recruitment, suspension and termination, namely shop-floor matters. This limitation is enforced by section 65(1A), also quoted above, which bans any action other than for a purpose stated in section 1(1)'s definition.

322. COSATU pointed out that the definition had been glossed over by the courts to limit the specified purposes to demands that were "reasonably capable of being achieved".[11]

323. In evidence, one of SACCOLA's witnesses stated that, for employers, the ultimate test in strike situations was whether the employer's business would be so jeopardised by excessive claims that the strike would have to be brough to an end.

324. COSATU claimed that such a ban also embraced socio-economic strikes of a wider nature and political strikes which, in view of the importance of unions in a country where the workers' voice often had no other means of being heard, amounted to a major restriction on workers' rights. COSATU led general evidence on the role of unions in various campaigns against government economic policy, such as the living wage campaign in 1987 and the two-day strike against the introduction of the VAT in 1991. As was described in Chapter 2 above, COSATU itself played a major role in the actions against the 1988 amendments to the LRA including the calling of a three-day stay-away from work. It also led evidence on COSATU's campaigns against other government policy, such as its anti-apartheid conferences in the 1980s and the Workers' Charter campaign, and its support for the conclusion of the Peace Accord (referred to in Chapter 5 above). COSATU's General Secretary, in particular, stressed its initiation of a process for macro-economic reform in which it would seek to participate with employers and the State in restructuring the South African economy.

325. The Government conceded that section 65 of the LRA did not permit strikes protesting, for example, amendments to the LRA. It admitted that this was not in conformity with ILO standards.

326. It submitted, however, that in the circumstances prevailing in South Africa there was a justification for the LRA's approach. It argued that, in practice, unions had protested against the Government's economic and social policies without the Government taking action against them for having done so; this was proof that the criminal provisions of the Act were not applied. It added that it was not conducive to good order and not in the public interest to allow strikes to be called for any cause. It pointed out that the ILO's principles themselves recognised that some limitations could be placed on the right of workers to strike. Nevertheless, the Government concluded that some progress may have to be made by negotiation to extending the present provisions regarding the objects and purposes of a strike - but some limitation would have to be applied.

327. Under this heading COSATU also listed certain prohibitions on the exercise of strike action. These included the ban in section 65(1)(a) on strikes during the currency of a binding industrial council agreement, award or industrial court determination, and the ban in section 65(1)(b) on strikes during the first year of a wage determination in respect of any matter contained in that determination.

328. In reply, the Government noted that the LRA distinguished between prohibited and permissible strikes. It pointed out that, in this case of section 65(1)(b), strikes were permitted a certain time after the promulgation of other wage regulating arrangements.

329. SACCOLA, in its written submissions, agreed with the LRA's limit on strike action to advance broad economic and social interests, in so far as it prohibited political strikes or strikes unrelated to the collective bargaining process. It disagreed with COSATU's interpretation of the LRA's limitation on strikes during the currency of a wage determination.

(c) Essential services

330. COSATU led a great deal of evidence on the bans contained in section 65(1)(a), (b), (c) and (d)(ii), section 65(2)(a) and section 46(1), (2) and (7). The relevant provisions of section 46 read as follows:

46(1) For the purposes of this section, the expression "employer referred to in subsection (1)" shall mean -

(a) any local authority: or

(b) any employer other than a local authority who within the area of a local authority provides light, power, water, sanitation, passenger transportation or a fire extinguishing service; or

(c) any employer to whom the provisions of this section have been applied under subsection (7); or

(d) any registered employers' organisation acting on behalf of one or more of the employers referred to in paragraph (a), (b) or (c) who is a member or who are members of that organisation;

and the expression "employee referred to in subsection (1)" shall mean -

(e) any employee employed by a local authority; or

(f) any employee employed by an employer referred to in paragraph (b) in connection with the provision of any service referred to in that paragraph; or

(g) any employee who is employed by an employer referred to in paragraph (c) and to whom the provisions of this section have been applied under subsection (7); or

(h) any registered trade union acting on behalf of one or more of the employees referred to in paragraph (e), (f) or (g) who is a member or who are members of that union.

(2) Whenever an industrial council or a conciliation board which has had under consideration a dispute in which the parties are one or more of the employers referred to in subsection (1) and one or more of the employees referred to in subsection (1) -

(a) has failed to settle the dispute within a period of 30 days reckoned from the date on which the dispute was referred to the industrial council or the date on which the application for the establishment of the conciliation board was lodged, as the case may be, or within such further period or periods on which the parties to the dispute may agree, or the period or periods as the Director-General may from time to time fix on good cause shown; or

(b) before the expiry of that period or further period or periods has resolved that further deliberations will not result in the settlement of the dispute,

it shall report accordingly to the Director-General and the dispute shall be referred to arbitration in accordance with the provisions of this section [...].

(7)(a) The Minister may from time to time by notice in the Gazette notify his intention of applying in an area specified in such notice the provisions of this section to employers and employees engaged or employed in such activities connected with -

(i) the supply, distribution, processing, canning or preserving of any perishable foodstuffs; or

(ii) the supply or distribution of petrol or other fuels for use by local authorities or other employers in connection with the provision of any service referred to in paragraph (b) of subsection (1),

as may be specified in the notice.

331. To summarise these legislative provisions, strikes are absolutely illegal and unprotected if the workers concerned are:

- employees - at any level - of a local authority;
- employed by an employer within the area of a local authority who provides light, power, water, sanitation, passenger transport or a fire extinguishing service; or
- employees of suppliers of perishable foodstuffs and supplies of fuel to employers whose services have been designated as essential by ministerial gazetting. It was pointed out that the Minister has exercised his power under this last head to prohibit strikes in the food and canning industry.[12]

332. COSATU argued that these bans went beyond services which are strictly essential in accordance with ILO criteria, namely services where an interruption would endanger the life, personal safety or health of the whole or part of the population. In particular, COSATU submitted that not all employees of local authorities were engaged in essential work. It cited support staff such as cleaners, gardeners or clerks in this respect. It pointed out that the ban on strikes in passenger transportation and in the processing and supply of perishable foodstuffs and petrol were in direct conflict with decisions emanating from ILO supervisory bodies.

333. For those categories of workers whose right to strike was prohibited in compliance with the strict definition of essential services, COSATU nevertheless contested the adequacy of the compensatory procedures available to them for dispute settlement. It cited the ILO approach that such compensatory machinery should include adequate and speedy conciliation and arbitration proceedings in which the awards, once made, are fully and promptly implemented. According to COSATU, the section 46 compulsory arbitration was unnecessarily complex, bureaucratic and time-consuming. In practice, the average time period from deadlock in an industrial council or conciliation board to the implementation of an award was five months.

334. In addition, COSATU listed strike bans applicable to other categories of workers by virtue of specific legislation affecting their sectors: members of the armed forces;[13] policemen;[14] prison officials[15] - whose position as public servants will be discussed in greater detail in Chapter 12 below; employees of the Armaments Corporation;[16] health workers;[17] and nurses.[18] COSATU argued that not all employees in these services carry out essential functions and that, an any case, the statutes involved did not properly compensate these workers for the limitations placed on their freedom of action. It referred to the above-mentioned ILO jurisprudence in this respect. Armaments workers, for example, were faced with lengthy and cumbersome procedures for settlement of disputes. There was no disputes settlement procedure at all for nurses, policemen and prison officers.

335. SACCOLA, in its written submissions, stated that strikes should be prohibited for all employees providing essential services as defined by the ILO, but considered passenger transport also to be essential. It supported

the provision of a minimum service during a strike the definition of which would have to be determined in the appropriate tripartite forum.

336. The Government agreed that COSATU's contentions were factually correct in view of the wording of section 46. It noted that compulsory arbitration as a compensatory procedure was available to the categories of workers denied the right to strike under that section, but was not available to the other categories of employees covered by legislation aimed at their specific sectors. While recalling the ILO jurisprudence on the importance of compensatory procedures to permit these categories of workers some form of dispute settlement procedure, the Government made no further comment on this aspect of this case.

337. The representative of the Minister of Manpower who gave evidence pointed out, with regard to the Minister's power to declare certain activities subject to compulsory arbitration, that very few applications had been received under section 46(7). Applications were published for objection and the Industrial Court was consulted and asked to make a recommendation. Applications were considered in the light of the public interest and so as to protect the general welfare of society at a particular time.

(d) Picketing

338. COSATU submitted that, although picketing was an act in furtherance of a strike and thus should be indemnified under section 79(1), it was not so protected because it could constitute an unfair labour practice given the provisions of section 1(4) of the LRA. Because it was often a crime by virtue of other statutes and municipal by-laws so the civil liability indemnity was not applicable.

339. For example, under section 53 of the Internal Security Act, if a procession could not take place without the permission, approval or leave of certain bodies such as local authorities, a magistrate's permission was required. Under section 46 of the Internal Security Act, any gathering may be prohibited for 48 hours by the local magistrate if he or she had reason to believe that the public peace would be seriously endangered, and the Minister of Law and Order had the power to ban any type of gathering if he or she deemed it necessary or expedient. This latter power was exercised continuously between 1976 and 1991 to ban all outdoor gatherings (which would include pickets) other than funerals and bona fide sports gatherings. This is described in greater detail in Chapter 8, paragraphs 277 to 286, as is the Government's reply. Moreover, under section 50 of the Internal Security Act, a police officer above the rank of warrant officer may exercise his discretion to arrest and detain any person for a period of 48 hours and for up to 14 days on application to a magistrate if he or she was of the opinion that the actions of the person contributed towards public violence.

340. On the issue of pickets as crimes, COSATU referred first to section 1 of the Trespass Act, 1959, under which an employee was guilty of an offence if he failed to heed the instructions of the lawful owner, occupier or person in charge to vacate the premises, even if the employee had entered the premises lawfully and even if his employment may not have been terminated at that stage. This Act was apparently used widely by employers to evict workers who embarked on strike action. According to COSATU, a condition frequently imposed for the granting of bail or a condition for the suspension of a sentence imposed under the Act would be a prohibition on entry to the premises without the express permission of the owner or occupier concerned. Secondly,

COSATU expressed doubts as to the ambit of the recently amended Intimidation Act, 1982,[19] believing that the wide range of conduct covered by the new offence of intimidation might affect pickets. The maximum fine for a contravention of this Act is R40,000 and ten years' imprisonment. Thirdly, COSATU referred to municipal by-laws which prohibited the holding of any public gathering or procession in areas under the control of that local authority, and also banned advertising at or near any street or sidewalk, without the local authority's permission or written consent. The grounds for refusal usually included belief that the event would result in public disturbances, damage to property, obstruction of traffic or interference with the convenience of the public generally. According to COSATU, such by-laws were widely used against unionists during strike pickets. However, while COSATU conceded that serious crimes were sometimes committed during strikes, its experience was that a high percentage of persons charged with offences relating to strikes and picketing either had the charges withdrawn or were acquitted.

341. One witness for COSATU described other forms of interference in picketing. During a wage dispute at a company known as Table Bay Spinners, the company approached the Supreme Court, on 20 minutes' notice to the union, requesting an order restraining the workers from picketing on company premises even though the picket was peaceful. The union, however, was faced with the unusual problem that it could not in any event picket outside the company since the premises were situated directly in front of the local police station, and picketing there would have contravened the law. A second example was the South African Clothing and Textile Workers' Union (SACTWU) "human chain" protest, in 1991, against job losses, retrenchments and short time. The linking of hands throughout the country's industrial areas for one hour on a particular day - which this witness described as a national picket - necessitated applications for permission to every magisterial district and municipality which would have been affected bythe human chain. Some refused permission; some granted it on condition that the chain be formed at another time.

342. In its written reply to COSATU's further submissions, the Government stated that at present picketing may constitute an unfair labour practice depending on the circumstances, but there had been many instances where it had been accepted as being perfectly legitimate. It picked up COSATU's concession that acts of violence may occur during strikes and pickets, but added that where charges had been withdrawn or accused persons acquitted, it was more often than not because the witnesses or complainants who had originally given statements to the police refused to give evidence for fear of their lives. As a final point at this stage the Government pointed out that the legislation referred to here was also part of CODESA's deliberations, a fact which made it inappropriate for government comment in any greater detail.

343. Subsequently, the Government stated that the immunity provisions of section 79 of the LRA applied to picketing. While it was true that many common law and statutory instruments may be invoked to curb picketing, it stressed that the ILO jurisprudence itself requires that workers and their organisations obey the law of the land. Nevertheless, the Government conceded that there was a need to reinvestigate the effects the various laws have on picketing and to regulate better the current situation.

344. SACCOLA, in its written submissions, stated that picketing should not be permitted as of right on an employer's premises without its consent. It was of the view that the LRA's provisions affecting picketing sought to find a balance between freedom of association and expression and limiting the abuse or unfair exercise of those freedoms by affording a limited indemnity in

terms of section 79 and by the application of the unfair labour practice jurisdiction of the Industrial Court.

(e) Sanctions for striking

(i) Criminal sanctions

345. According to COSATU, calling for or participating in strikes which were illegal for any of the grounds set out above, constituted a criminal offence and was punishable as such. For workers banned from striking by specific statutes, heavy penalties for contravention applied as pointed out above. In addition, such action in breach of the LRA was punishable, under section 82(1)(d), by a fine of up to R1,000 or one year's imprisonment, or both.

346. The Government stated that the criminal provisions of the LRA were not applied. SACCOLA, in its written submissions, agreed with COSATU that all strikes should be decriminalised.

(ii) Civil law restraints

347. Section 79 of the LRA confers an indemnity on strikers and their unions against civil proceedings arising out of a legal strike. It does not protect workers involved in illegal strikes (for example, action for purposes other than those specified in section 1 of the Act, or action in technical non-compliance with section 65) or striking workers who are not covered by the Act, against whom common law actions for breach of contract or delict (tort) may be claimed. For the first cause of action (contractual breach) damages are claimable but in practice, according to COSATU, employers seldom went further than to threaten such an action, partly because of the difficulty in proving the quantum of damages but mainly because of the industrial relations consequences of launching such a claim. For the second cause of action (in delict for the incitement to commit a breach of contract), unions could be sued for damages and subjected to an interdict (injunction). Under this head also fell actions for breach of a statutory duty not to incite or participate in illegal strikes; a final or interim interdict might be claimed, as might be damages.[20]

348. COSATU also alleged that the use of interlocutory relief against strikes constituted a serious abridgement of the right to strike, particularly in view of the fact that the wording and requirements of the LRA were such a fertile source for technical contraventions. The South African law on interdicts required considerations of urgency, the inability to hold a proper hearing at an early stage, that irreparable harm may be caused while waiting for a hearing and the absence of an alternative remedy. According to COSATU, the application of these rules for granting interdicts in labour disputes was dangerous since interim orders often remained permanent. The dominant motive behind an employer's application was often no more than a tactical delay and interim orders did not preserve the status quo because the suspension of the strike affected the union and allowed the employer to resume efforts to defeat the strike. It also released the employer from having to resolve the dispute which had given rise to the strike.

(iii) Dismissals

349. According to COSATU, the most telling reprisal against striking was dismissal from employment. It claimed that protection against unfair dismissal was both erratic and uncertain. It stressed that dismissals were resorted to very often in South Africa and described such action as a kind of "primary right" of employers leaving workers the only redress of turning to "weak and biased courts". It stated over and over again that, under the current legislation, there was nothing to prevent employers from dismissing strikers even if the strike was legal according to the statutory requirements, but added that when a cause of action was made out under the unfair labour practice definition the courts did have a discretionary power to order reinstatement. Unfortunately, it was never known how this discretion would be exercised.

350. The Labour Appeal Court has held that "the Act does not confer a statutory right to strike and a strike is nowhere legally sanctioned. It does not deprive an employer of his common law right to dismiss an employee who refuses to perform his contractual obligations ... There is not in our law, and it has certainly not been introduced by the Act, a fundamental right to strike ... What the Act does introduce is the notion of unfair labour practice, and employees are protected to the extent provided for. Circumstances may be such as to render his dismissal unfair within the meaning of the expression as defined in the Act".[21] The same Court has gone further in stating that the court will only in "exceptional circumstances" protect strikers against dismissal and deny the employer its common law remedy where the dismissal appears itself to be an unfair labour practice.[22]

351. The "circumstances" which the courts have relied on - even in the case of legal strikes - were, in COSATU's opinion, ad hoc, contradictory and too limited. The bundle of factors included: the cause of the strike; the nature of the strike; the extent of the strike; the objective of the strike; the circumstances of the employees or of the employers; the duration of the strike; the consequences of the strike; the purposes of the Act; the principles of collective bargaining; the presence or absence of negotiations in good faith; the provisions of the service contract; the conduct of the union and its members during the strike and the conduct of the employers.[23]

352. COSATU argued that there was no coherence in the application of these factors. The law in this respect was so uncertain as to constitute a serious abrogation of the right to strike. In support of this contention COSATU gave several examples of arbitrary decision-making, including:

- non-compliance with plant agreements;[24]

- refusal, by either party, to bargain in good faith;[25]

- purpose of the strike;[26]

- the duration of a strike;[27]

- the conduct of the union;[28]

- compliance with section 65, conduct of the ballot, failure to give notice to commence a strike, violence or damage to property during a strike;[29] and

- failure to give reasonable notice.[30]

353. COSATU also submitted that, when the strike was legal, the courts' inquiry into the fairness of the strike was more broad-ranging. The courts tended to see the fairness of the dismissal as inversely related to the fairness of the strike: the more unfair the strike, the more fair the resulting dismissal.

354. It also stressed that, where a dismissal was found to be unfair, reinstatement was far from automatic. Frequently courts considered that the intervening delay made reinstatement impracticable, or referred to the unfairness visited upon the replacement workers who would lose their jobs, or were of the view that compensation would suffice. COSATU submitted that judicial delay should not have repercussions on the parties. It was also of the opinion that the removal of the replacement workforce should be balanced against reference to the number of years served by the dismissed workers. Lastly in this area, COSATU referred to the problem of selective re-employment of workers whose dismissal had been found to be fair. The selective re-employment of such workers had been held by the courts to be fair no matter what criteria for selection are used. The rationale used was that fairly dismissed workers were no longer "employees" for the purposes of the Act and thus fell outside its purview.[31]

355. One witness called by COSATU stated that the incidence of violence during strikes was directly attributable to the dismissal of strikers and the uncertainty surrounding the Indusrial Court's approach to the reinstatement of strikers. The workers' bitterness showed because even if the union took great pains to abide by the procedural and other requirements for a legal strike, the strikers faced dismissal, and shop stewards could not assure them that reinstatement proceedings would be successful. In addition to this uncertainty there was the length of proceedings. It sometimes took eight months for a first instance decision to be handed down, during which the dismissed strikers were often evicted from their place of work, and sometimes also from their accommodation, and were unsure as to whether to seek work elsewhere. This state of affairs produced a disrespect for the law.

356. Another of COSATU's witnesses gave a graphic account of how elements of the above allegations were handled in a particularly well-known case in South Africa. In 1987, NUM held a strike over wages and conditions of employment involving 340,000 workers. It was legal under section 65 of the LRA. However, union organisers had problems obtaining access to strikers who lived and worked on mine premises. Despite the end of the strike following the employers' systematic campaign to get strikers back to work, 50,000 were dismissed. The access problem (described as well in Chapter 10) left the strikers leaderless. Nevertheless but the employers' hostile attitude hardened after the dismissals. Out of 13 mines where NUM had secured recognition agreements, it was derecognised in five because its membership level had drastically fallen because of the massive dismissals. All dismissed workers were bussed off the mine properties within a three-day period. They were dispersed to their homelands all over the country or returned to foreign countries such as Lesotho. The union sought reinstatement through private arbitration since it believed there were excessive delays using the Industrial Court route. In addition, it was unsure of the outcome of Industrial Court proceedings since there was no precedent involving such massive dismissals. A SACCOLA witness agreed with this assessment of choice of procedure. Arbitration did lead to settlement, with 30,000 workers being re-employed and 10,000 receiving severance benefits. The COSATU witness estimated that 10,000 dismissed workers were still unemployed today. He pointed out that it had taken two years for the union to recover from the effects of the strike-related dismissals.

357. Yet another witness called by COSATU described a case involving BTR Sarmcol strikers in the Mpophomeni Township in KwaZulu and handed in a large amount of documentation produced by the Metal and Allied Workers' Union (MAWU) on it. Following deadlock with the employer on demands for a fuller recognition agreement, MAWU called a legal strike in May 1985. The employer dismissed 950 workers, locked them out of the factory, banned pickets and used the police to disperse them. The union took the alleged unfair dismissal to the Industrial Court in an application for reinstatement.[32] Having lost there in 1987, it appealed to the Supreme Court for judicial review on the ground that one of the judges had exhibited ostensible bias by addressing a management seminar, attended by employers' representatives, during the course of the hearing and this despite a request by the union not to do so.[33] The review was successful. However, the employer has appealed to the Appellate Division against this decision. The appeal was to be heard only in March 1992, seven years after the strike. Despite several demands, the employer refused reinstatement. It began employing strike breakers. The union, in response, organised broad community support for the dismissed strikers through a stay-away and then through a consumer boycott. The witness admitted that there was violence against the strike breakers. However, he expressed the view that this was a reflection of frustration over the employer's attitude. In addition to a ban on public meetings due to the declaration of a state of emergency and the arrests of nearly 100 strikers during the strike, the union faced the problem of the eviction of strikers from company accommodation and recruitment of the scab labour by a rival, state-supported union, UWUSA, which within six months had signed a recognition agreement with the employer. This witness stressed that the strike was still under way and that the dismissed strikers had had difficulty getting other jobs because BTR Sarmcol was the only big employer in the region. He believed that, even seven years after the event, the employer had to take the dismissed workers back since the company had been at fault. A description of this witness's personal experience of violence related to trade union activity appears in Chapter 10.

358. The Government replied generally to all the points made above. It noted that a remedy for the lack of appropriate protection against reprisals for strike action, especially dismissal, could be an effective and reliable indusrial court. It admitted that the present system was not working well. It conceded that there were problems of delays, uncertain decisions, lack of rapid intervention to defuse potential strikes, and a need to ensure that appointees to the court had the confidence of the parties. It agreed with the suggestions put forward by some witnesses that a decentralised court might be better, one composed of lawyers or other qualified persons having security of tenure and commensurate salaries, not requiring formal evidence but using an inquisitorial system to arrive at immediate solutions. These could then be reviewable but not appealable. It argued, however, that a general ban on dismissals would be unrealistic.

359. The Government added that the uncertainty and inadequacy of protection under the LRA should be a matter of negotiation between employers, unions and the Government, as it was impossible to legislate rules in this regard. Since an unfair labour practice procedure which applied the rules of fairness and equity should be adequate to deal with this difficulty, it invited "advice as to how it can improve the present industrial court system and streamline its operations".

360. The representative of the Minister of Manpower who was called by the Commission itself saw, as one of the major deficiencies of the LRA, problems with the definition of unfair labour practices, and the process of dispute settlement, in particular strikes and lockouts. Noting that the NMC was the body to advise the Minister on all labour matters including labour policy and administrative matters, he referred to its recommendations on modernising and

consolidating the Act. He also referred to the possible restructuring of the NMC and the fact that a new Minister had recently taken office. He stated that the right to strike was recognised as an essential part of the bargaining process, but that strikes should only be resorted to once every avenue of negotiation had been explored: hence the procedural requirements of section 65. He stated that the Industrial Court had protected employees from dismissal under both its status quo jurisdiction under section 43 to reinstate employees and the unfair labour practice jurisdiction for participating in strikes substantially in compliance with section 65. There were also instances where the Industrial Court has come to the aid of workers where strikes were not in compliance with section 65.

361. This witness stated that strikes were a very sensitive area in South Africa. The approach of the Ministry was that any changes to the unfair labour practice regarding dismissals following strike action or any specific legislative provision dealing with them would have to be determined on a tripartite basis having regard to the needs of the economy so as to be able to function in a free market system, not to violate the legal sensibilities of the community and also to protect the rights of both employers and workers so that fairness and equity prevails in each case.

362. Another witness called by the Commission, a member of the NMC, stressed that the present LRA needed to be made more "user friendly" by simplification and redrafting. The NMC's proposed consolidated Act would circumscribe the powers of the proposed labour court (to replace the Industrial Court) to formulate the rules of the game. This would achieve a measure of certainty about the definition of unfair labour practice and compensate for the lack of a system of precedent. He also attributed some of the present problems in this area to: (1) "the calibre of the appointees to the Industrial Court"; (2) the fact that they were overworked (facts presented to the Commission showed a dramatic rise in the caseload: four cases in 1979 to 801 in 1985 to 6,051 in 1991); (3) the great delays which had resulted (in one case up to four years); and (4) the poor remuneration of the members of the Court.

363. SACCOLA, in its written submissions, stated that employees and trade unions participating in strikes which complied with the LRA should be afforded some measure of protection. Strikes in contravention of reasonable restrictions and prohibitions should not be protected. No one should be protected from prosecution for criminal acts committed in furtherance of a strike.

364. The conclusions of the Commission on the matters dealt with in this chapter are contained in paragraphs 639 to 670 below.

Notes

[1] For further details, see Chapter 1, footnotes 7, 8 and 9.

[2] See Chapter 2, paras. 45 and 46.

[3] See Chapter 3, para. 56.

[4] Chamber of Mines of SA v. National Union of Mineworkers (1987) 8 ILJ 68(A): where it was held, on appeal, that the union's application for a conciliation board to settle a dispute, in the context of collective bargaining, over the granting of May Day as a paid holiday was invalid for want of a dispute. It had informed the employer that unless its demand was accepted by a certain date it would consider itself in dispute with the

employer and yet one day before the expiry of its own deadline it applied for a conciliation board to settle the matter. There was thus no right to call a strike subsequently over the issue.

[5] Dunlop SA v. Metal and Allied Workers' Union (1985) 6 ILJ 167(D): where it was held that the employees had engaged in a strike in respect of demands, some of which had not formed part of the subject matter of the original application for a conciliation board; the subsequent strike was in contravention of s. 65 of the Act.

[6] Ngubane v. NTE Ltd. (1991) 12 ILJ 138(IC): where it was held that an employer wishing to support its wage proposal by a legal lockout must itself fulfil the prerequisites of section 65, in this case by applying independently for the establishment of a conciliation board rather than relying on the union's application; the applicants, who were members of the SA Chemical Workers' Union, had thus been victims of an unfair labour practice and were granted compensation.

[7] White v. Neill Tools Pty. Ltd. (1991) 12 ILJ 368(IC): where it was held that the strikers should have used the employer's grievance procedure and thus their application against unfair dismissal failed.

[8] NUMSA v. Jumbo Products (1991) 12 ILJ 1048(IC): where it was held that whereas the dispute before an industrial council concerned the alleged unfair retrenchment of certain employees, the issue set out in the strike ballot paper merely referred to a demand for severance pay on retrenchment; since the ballot paper did not reflect the real issue on which the strike was to be called, the subsequent strike was illegal and the dismissals flowing from that strike did not constitute an unfair labour practice.

[9] Sasol Industries Pty. Ltd. v. SA Chemical Workers' Union (1990) 11 ILJ 1010(LAC): where it was held, on appeal, that there had been a deliberate flaunting of the requirements of a proper ballot since it had not been held in secret and since votes far in excess of the number of union members had been cast; thus the illegality of the strike could not be said to be merely technical in nature. Since the union had come to the court with unclean hands, the dismissal of the strikers was not an unfair labour practice.

[10] South African Breweries v. Food and Allied Workers' Union (1989) 10 ILJ 844(A).

[11] Barlows Manufacturing Co. v. Metal and Allied Workers' Union (1990) 11 ILJ 35(T).

[12] Government Notice 1527 GG 6284 of 25 Sep. 1959.

[13] Defence Act, No. 44, of 1957.

[14] Section 17B of the Police Act, No. 7, of 1958.

[15] Section 13B of the Prisons Act, No. 8, of 1959.

[16] Section 8G(4) of the Arms Development and Production Act, No. 57, of 1986, a contravention of which is punishable by a fine not exceeding R1,000 or imprisonment not exceeding five years, or both.

[17] Section 55A of the Medical, Dental and Supplementary Health Service Professions Act, No. 56, of 1974.

[18] Section 40(2) of the Nursing Act, No. 50, of 1978.

[19] Section 1(1)(b) reads:

> 1(1) Any person who -
>
> (a) ...
>
> (b) acts or conducts himself in such a manner or utters or publishes such words that it has, or they have, the effect, or that it might reasonably be expected that the natural and probable consequences thereof would be, that a person perceiving the act, conduct, utterance or publication -
>
> (i) fears for his own safety or the safety of his property or the security of his livelihood, or the safety of any other person or the safety of the property of any other person or the security of the livelihood of any other person; and
>
> (ii) is induced by his fear to do or abstain from doing any act or to assume or abandon a particular standpoint;
>
> is guilty of an offence.

[20] Patz v. Greene (1907) TS 427.

[21] NUMSA v. Vetsak Cooperative Ltd. (1991) 12 ILJ 564(LAC).

[22] Perskor v. Media Workers Association of SA (1991) 12 ILJ 86(LAC): where it was held, on appeal, that since there is no "right" to strike under the LRA and notwithstanding the union's use, twice, of all the required settlement procedures and the fact that settlement was reached on the third day of the strike, the employer's decision to proceed to dismiss the workers was fair: to deny an employer the right to dismiss strikers was to leave it defenceless against the strikers. This decision is being challenged before the Appellate Division of the Supreme Court.

[23] NUM v. Marievale Consolidated Mines Ltd. (1986) 7 ILJ 123(IC).

[24] Pilkington Shatterprufe Safety Glass (Pty.) Ltd. v. CWIU (1989) 10 ILJ 123(IC): where it was held that there was no obligation on the union under the recognition agreement to negotiate certain demands at a designated centralised bargaining forum and thus the union's application for settlement of this issue by a conciliation board was not in breach of the recognition agreement and did not constitute an unfair labour practice; the employer's application for urgent relief under the LRA was refused.

[25] Black Allied Workers' Union v. Asoka Hotel (1989) 10 ILJ 167(IC): where it was held that employees who engaged in legal strikes in circumstances where the employer had not negotiated in good faith nor demonstrated its reasonableness would be protected and thus the dismissals in this case were found to be unfair labour practices. The Court ordered that the unionists be reinstated.

[26] BTR Dunlop Ltd. v. NUMSA (1989) 10 ILJ 701(IC): where it was held under the legislation in force before the 1991 amendments that the union's demand of reference of the dispute to arbitration under pain of strike action constituted an attempt unfairly to coerce the employer into waiving a statutory right to have the dispute heard by the Industrial Court and appeal fora, and that the central issue was in any case a dispute of right over which a strike was not possible and would be an unfair labour practice; the Court therefore issued a status quo order restraining the union from strike action.

[27] SACWU v. Sasol Industries (1989) 10 ILJ 1031(IC): where it was held that notwithstanding the technical illegality of the strike the Court would look at the employer's reaction to it which, in this case, had involved the issuing of return-to-work ultimata on the first and second days of the strike and dismissal notices from the third day thereafter, being precipitate and unnecessary at that stage according to the Court; despite the length of time which had passed since the dismissals and the court order (two years), the Court ordered reinstatement.

[28] Food & Beverage Workers' Union & Others v. Hercules Cold Storage (Pty.) Ltd. (1990) 11 ILJ 47(LAC): where it was held, on appeal, that although the strike action was fair in that it aimed at resumed wage negotiations, the conduct of the strikers in failing to notify the employer of the strike and by commencing it only after meat had been taken out of cold storage was calculated to cause maximum loss. By their conduct they waived a claim to equitable relief and the appeal against dismissal was dismissed.

[29] Food & Allied Workers' Union v. National Cooperative Dairies Ltd. 2 (1989) 10 ILJ 490(IC): where it was held, inter alia, that the union deliberately embarked on an illegal and non-peaceful strike where incidents of intimidatory conduct and assault took place. Thus, although there was merit in the employees' contention that it was unfair of the employer to have dismissed them when it was clear that the strike was about to end, reinstatement was refused.

[30] Black & Allied Workers' Union & Others v. Edward Hotel (1989) 10 ILJ 357(IC): where it was held that the employer had ignored the most basic obligation to avoid and settle disputes by consistently refusing to meet and discuss wage claims with its employees. Its attitude had been the antitheseis of objectivity and flexibility when it gave striking employees one hour in which to return to work and five minutes to vacate the hotel premises when that hour was up. The Court ordered that the workers be reinstated.

[31] Borg-Warner (Pty.) Ltd. v. National Automobile and Allied Workers' Union (now NUMSA) (1991) 12 ILJ 549(LAC).

[32] MAWU v. BTR Sarmcol (1987) 8 ILJ 815(IC).

[33] MAWU v. BTR Industries SA (1989) 10 ILJ 615(N).

CHAPTER 10

PROTECTION OF THE RIGHT TO ORGANISE

(a) Attacks on unionists and union premises

365. The obligation to ensure respect for civil liberties essential to the exercise of trade union rights is implicitly contained in Convention No. 87, since according to the terms of Article 8, the law of the land shall not be such as to impair, nor shall it be applied as to impair, the guarantees provided for in the Convention. In its 1970 resolution concerning trade union rights and their relation to civil liberties, the International Labour Conference placed special emphasis on certain civil liberties as essential for the normal exercise of trade union rights. These included the right to freedom and security of person and freedom from arbitrary arrest and detention, and the right to the protection of the property of trade union organisations.[1]

366. In its submissions to the Commission, COSATU pointed to the fact that there had been a large number of attacks on trade unionists or trade union premises, and cited approximately 70 examples of these which were alleged to have occurred since 1986. It claimed further that the attackers, some of whom had been identified, had not been prosecuted.

367. COSATU went on to assert that the nature and frequency of the attacks were such that prosecutions of those responsible could have taken place had there been the will on the part of the Government authorities to do so. It asserted that the failure to do so had seriously undermined trade union activities and deprived trade unionists of the right to organise which ILO principles safeguard.

368. The response of the Government, in its written argument, consisted of an admission that there had been numerous reports that such attacks had occurred and that many of the cases were at present under investigation by the police, as were other reports of attacks by members of COSATU on persons who were not members of that organisation.

369. In addition, the Government stated that such attacks had unfortunately become a fact of life in the climate of violence and confrontation which prevailed in South Africa and that this was one of the most important aspects of South African society being addressed by the Convention on a Democratic South Africa (CODESA).

370. Annexed to the submissions of COSATU was a document which listed the attacks which it alleged had taken place, together with a brief description in each case of what was said to have occurred. These were on the whole based on newspaper reports, photocopies of which were handed in.

371. An examination of these submissions discloses allegations that there had been

- seven instances of killing, attempted killing, assault or disappearance of trade unionists from the following unions or union organisations: Food and Allied Workers' Union (FAWU), National Council of Trade Unions (NACTU), National Education, Health and Allied Workers' Union (NEHAWU), National Union of Mineworkers (NUM), South African Commercial, Catering and Allied Workers' Union (SACCAWU) and South African Railway and Harbour Workers' Union (SARHWU);

- some 23 instances of alleged petrol-bombing or arson in respect of the premises of COSATU and/or its affiliates (FAWU, Garment and Allied Workers' Union (GAWU), Metal and Allied Workers' Union (MAWU), NEHAWU, National Union of Metalworkers of South Africa (NUMSA), South African Allied Workers' Union (SAAWU), SARHWU, Transport and General Workers' Union (TGWU) and the Union of Unemployed Workers);

- some 19 occasions on which there was alleged to have been vandalising or there had been burglaries at COSATU offices (i.e. its headquarters or regional or branch offices in a number of towns, principally in the Transvaal province) or those of its affiliates (Construction and Allied Workers' Union (CAWU), Commercial, Catering and Allied Workers' Union (CCAWUSA), FAWU, NUMSA, Posts and Telecommunications Workers' Association (POTWA) and SARHWU). Similar events were said to have occurred twice in respect of the offices of NACTU (one in a township in the Transvaal, the other in Stellenbosch);

- 11 examples were cited of petrol-bombing of the homes of trade union officials or former trade union officials of COSATU, Amalgamated Clothing and Textile Workers' Union of South Africa (ACTWUSA), CCAWUSA, MAWU, NEHWU, NUM and POTWA in towns or townships situated in the Transvaal, Orange Free State or - in one instance - the Transkei; one of these was said to have resulted in injury to the trade unionist and his son who were in the home at the time of the alleged incident.

372. Three of the allegations appeared to involve the impersonation of the police (these related to two incidents involving COSATU offices - in Johannesburg and Germiston - as well as that concerning the POTWA official and his son). A further three examples were given of the alleged use of listening devices on union premises (two of them involving NUM and the Paper, Printing and Allied Workers' Union (PPAWU)).

373. An indication of the damage caused by some of these attacks was given in the evidence of one of the witnesses who testified before the Commission concerning events which had occurred in 1987 and 1988 at COSATU offices in Johannesburg, Bloemfontein, Cape Town, Kroonstad, Pretoria and Welkom. For instance, the bombing which had taken place on 7 May 1987 at the Johannesburg office was said to have resulted in damage amounting to R2,000,000 (i.e. somewhat more than US$650,000).

374. An indication of the kind of violence which had occurred in relation to industrial disputes was contained in evidence relating to the strike by mineworkers in 1987. It was stated in this regard that, when the strike was over, 11 workers had been killed and more than 600 had been injured. Other evidence, provided on behalf of employers, indicated that 72 killings and the violence at the President Steyn mine were the subject of investigation by a commission of inquiry which had been set up under the Peace Accord (see below, paragraph 382).

375. One witness gave evidence of extensive violence, intimidation and attacks on trade unionists which were either within his personal experience or had been brought to his attention as a trade union official. Several of these were said to have occurred in Natal, during the course of a strike at the plant of BTR Sarmcol. He also provided an instance of violent attacks (involving inter alia the burning of houses) by workers, who were at the time (1986) on strike, against workers who had been brought in to replace them.

376. This witness also provided evidence of other violence which was said to have occurred in relation to the strike, involving inter alia the abduction of two shop stewards, two other workers and the daughter of one of them by the

KwaZulu police. He stated further that one of the shop stewards, as well as one of the workers and the daughter were shot and burnt, while one of the others had escaped with gunshot wounds and his own (i.e. the witness's) car had been burnt. The witness claimed that the police had been reluctant to investigate these crimes and that an inquest had only been held in 1988, when a leader of the Inkatha Youth Brigade had been identified as one of the culprits. He stated that no arrests had been made. Another instance cited concerned the attack on the home of a NUMSA shop steward which had been petrol-bombed; on that occasion, her husband and daughter had been shot as they were running away, while she herself had died of burns incurred during the attack.

377. The same witness provided other examples of alleged attacks by armed gangs in March and April 1989 on residents of townships inhabited by trade unionists which the police were said not to have attempted to prevent, despite the intervention of other parties including a member of parliament and a priest; instead, it was alleged, the police had on a number of occasions taken action against workers, including assaults with rawhide whips (sjamboks), the use of tear-gas to disperse crowds and on one occasion its use directly on trade unionists who were also assaulted.

378. The witness indicated, however, that the Minister of Law and Order had undertaken to investigate one of these incidents after a protest by 500 women and complaints by attorneys acting on behalf of the union. An interdict had been obtained as a result of an application by the attorneys. This ordered the South African Police to refrain from assaulting, threatening, harassing and intimidating residents of the townships. Remarkably enough, the application for this interdict had not been opposed by the police.

379. Another witness provided a general description of physical violence which he said occurred in relation to farmworkers. He claimed that such violence was a method of disciplining workers and of victimising those who stood up to employers and/or were actively involved in trade unions. He indicated that a number of these instances had been reported in the press. He claimed that there had been an alarming increase in the number of such cases, stating that 40 were said by the Stellenbosch Advice Office to have occurred between mid-1987 and late 1989, 11 in 1990 and 13 in 1991. He went on to state that in many cases farmworkers were afraid to lay charges against the farmers with the police or to institute proceedings for damages. In reality, he said, farmers were seldom prosecuted. Even where there had been prosecutions after poor or indifferent investigation by the police, these were conducted in a lax or incompetent manner before rural magistrates biased in favour of farmers with the result that only light sentences were given.

380. Three cases were cited of which two occurred in the Transvaal in 1988 and the third in the Cape Province in 1990. All three involved the killing of farmworkers, the third also entailing assaults on several farmworkers other than the worker who was killed. The deaths were caused respectively by whipping and beating; kicking; and assault with a pick handle. In all three cases, convictions were obtained: the first resulted in a suspended jail sentence and a fine; the second in a fine; and the third in a sentence to three years' imprisonment, half suspended - of which only six days were served in prison after the prisoner benefited from amnesties.

381. In evidence led on behalf of employers in the farming industry, it was stated that the testimony of the witness concerning violence against farm employees was unsubstantiated.

382. The Government introduced evidence concerning the conduct of the police and in rebuttal of the specific allegations submitted on behalf of

COSATU. Much of this related to the obligations to be assumed by members of the police force in terms of the National Peace Accord agreed in September 1991 by some 27 parties (similar to, but somewhat broader in scope than, those participating in CODESA: for instance, they include COSATU, NACTU and the South African Council of Churches). The Accord itself was submitted to the Commission in evidence, as was evidence showing the appointment of a Commission of Inquiry into the Prevention of Public Violence and Intimidation relating to its enforcement, which is presided over by Mr. Justice R.J. Goldstone, a Judge of the Appellate Division of the Supreme Court. Other aspects of evidence relating to the conduct of the police are dealt with below, in section (c) of this chapter. Other evidence concerning the extent of violent crime in South Africa has already been referred to in Chapter 5 above.

383. One of the statements in the written evidence submitted by the witness testifying at the instance of the Government in this regard was to the effect that once an alleged crime had been committed or violence erupted which might result in the death of or serious injury to any person, or the serious damage to property, the South African Police had a duty to act in terms of section 5 of the Police Act, 1958.

384. Some documentary evidence was provided to the Commission on the manner in which allegations relating to crimes of violence were investigated and the results of such investigations. All of these dealt with murder, rape, assault and/or robbery; none related to trade unions or trade unionists.

385. After the completion of the Government's oral summing up at the conclusion of the Commission's hearings, and after the proceedings had been terminated, one of the Government's representatives submitted to the Commission a document prepared by the South African Police which set out in detail information gathered on incidents mentioned in the documentation submitted by COSATU (see above, paragraphs 370 and 371). This evidence was not introduced through a witness. It was not therefore the subject of questioning either by COSATU or by members of the Commission.

386. The document commenced with an invitation to COSATU to come forward with either the necessary information in connection with the cases listed which were not reported, or to provide the police with more details of cases which, according to their information, were reported, but of which the police could not trace any records.

387. It would appear from this document that, of the specific instances cited by COSATU, in 35 cases the police did not have records of their having been reported. They had not been investigated.

388. In 27 of the instances which were said to have been reported, and which were investigated, the cases had been closed without any charge being preferred. These included most of the cases involving the petrol-bombing or vandalising of trade union offices, including that of COSATU. In respect of the latter, there was a comment in the document to the effect that the building in question was very old, that heaters were left on throughout the winter and that in the circumstances the fire hazard was dramatically increased.

389. Of the remaining cases referred to

- one case was still being investigated, it being stated that no proof existed that the persons were killed or murdered for union activities;

- two were stated to involve false accusations;

- in respect of four, the police was said to have no jurisdiction (because the matter fell within the responsibility of another police force, i.e. in KwaZulu or one of the other homelands);

- charges of murder had been preferred in one case against three persons: one of these had been found not guilty, a second had been murdered before his trial could commence, and charges against the third had been withdrawn.

390. In replying to COSATU's allegations on this matter as well as some of the instances cited in part (c) of this chapter, the Government conceded that unions and their members were often harassed by officers of the State and in some cases by employers, but relied on its assertion that in this regard, as in other respects of the case, the position had improved since February 1990. It further asserted that COSATU witnesses had not given evidence to the effect that there was a great deal of violence and unlawfulness in South African society, something which had been graphically illustrated by police statistics relating to murders (of which there had been 14,693 in 1991 alone).

391. The Government went on to point out that the great majority of the attacks which had been listed by COSATU were alleged to have taken place prior to February 1990. It added that, in its view, it was a fact that people who had for years been conditioned by apartheid could not be expected to change overnight but that all possible steps were being taken to change the situation, in particular through CODESA and the Peace Accord.

392. SACCOLA, in its written submissions, pointed out that it had publicly condemned violence. It added that incidents of violence in the industrial relations context had not been limited to union officials and management. There were numerous recorded incidents of violence perpetrated by union officials and members, often during the course of strike action. Officials of unions affiliated to COSATU had been convicted in the courts of common law crimes, including murder and assault, for such acts.

(b) Employer restriction on access to premises

393. Given the implications of Article 3 of Convention No. 87, it is clear that access to workers is a prerequisite for the effective functioning of trade unions. Article 2 of the Workers' Representatives Convention, 1971 (No. 135) provides that "Such facilities in the undertaking shall be afforded to workers' representatives as may be appropriate in order to enable them to carry out their functions promptly and efficiently." The nature of these facilities, including access to workplaces, is spelled out in the supplementary Workers' Representatives' Recommendation, 1971 (No. 143). Where workers reside on property owned by the employer, the Committee on Freedom of Association has concluded that it is only by having access to that property that trade union officials can carry out normal trade union activities among workers.

394. In identifying issues to be addressed by the Commission, COSATU pointed out that there was no statutory right of access by trade unionists in respect of the premises of the employer, and that property rights were frequently used to restrict or prohibit trade unions from communicating with members. It asserted that this had the effect of undermining trade union activity in circumstances where the employees resided on such premises, as was the case with the substantial number of the South African work force which was employed on farms and in the mining industry (where workers are housed in

compounds). COSATU went on to state that employers in the mining industry had consistently refused to allow reasonable access to their premises for trade union purposes by trade union officials.

395. Most of COSATU's allegations on this aspect of the case in fact related to the mining industry. The allegations fall into a number of different categories.

396. Generally, as regards the ability of unions and union officials to be in contact with their members, it was alleged that there had been:

- periodical withdrawal of access for union officials to mine property, including hostels;
- prohibition of union officials from entry into hostels where their members and other workers resided; and
- unreasonable constraints placed on the times at which union officials could be present on mine property, so that they could not be there when most employees were not working.

397. A further set of allegations were to the effect that:

- union officials were refused access to mines for the purpose of recruiting members (in cases where there was no recognition agreement);
- employees were prohibited from recruiting other employees as union members on mine property, including hostels;
- all trade union activity in hostels on some mines had been banned; and
- the use of mine property for the purpose of conducting ballots had been refused.

398. A third set of allegations related to the holding of, and attendance by certain union officials at, meetings on mines. These included:

- the prohibition of outdoor meetings and processions at mines;
- the withdrawal of facilities for meetings of union members which were required during the course of negotiations; and
- the prohibition of attendance by regional union officials at local meetings, including those between local union officials and local mine management, as well as the prohibition of other union officials employed at other mines from attending and addressing meetings.

399. A fourth set of allegations related to interference in the manner in which meetings were conducted. These included:

- the prohibition of singing and other forms of cultural expression at union meetings;
- insistence on the presence of management representatives, including security personnel, during meetings of union members;
- attempts at controlling the agenda of meetings; and
- the filming of employees entering or leaving union meetings on mines.

400. Less detailed allegations were made in respect of the absence of access by trade union officials to farms. In this regard it was, however, pointed out that the Trespass Act, 1959, made it a criminal offence for anyone to enter on the land of a lawful owner or occupier and that employees were not included within the definition of "lawful occupiers", while entering land for the purpose of organising workers was not viewed as a lawful reason for the purpose of the statute. It was stated that arrests under this legislation occurred regularly in rural areas.

401. The response of the Government on these matters drew attention to the definition of unfair labour practice as contained in the LRA and contended that a number of the examples cited by COSATU could be remedied by seeking relief from the Industrial Court where victimisation had occurred. In this regard, it cited a number of cases decided in that court in 1982, 1985 and 1986 to illustrate the concepts of fairness and equity which had been developed concerning relations between employers and employees as well as trade unions.[2] As regards access by trade unions to employer premises, it referred in particular to the case of Food and Allied Workers Union v. Clover Dairies[3] in which the Industrial Court had ordered that such access be granted for the purpose of ballotting union members as to a possible strike. It relied further in this regard on discussions which were said to be taking place in the context of CODESA regarding all aspects of freedom of association, stating that in the circumstances it would be inappropriate to go into the matter in further detail. SACCOLA submitted that the right of access should continue to be regulated through collectively bargained agreements and by the labour courts through the unfair labour practice jurisdiction.

402. As to farmworkers, the Government pointed to the vague and unspecific nature of COSATU's assertions, stating that it was impossible to comment in the absence of any specific examples of victimisation.

403. A number of witnesses gave evidence before the Commission on these matters. One described the nature of the gold mining industry in particular, pointing out that it employed some 750,000 people most of whom were Black and that virtually all Black mineworkers resided in hostels situated on property owned by the mines. He stated that individual mines were large enterprises, one employing as many as 45,000 people, and were often situated at a considerable distance from major urban areas which, in his view, made trade union organisation impossible without using the facilities available on the mines.

404. The witness went on to say that mine management regarded access to mine property as an aspect of managerial prerogative and that even where collective agreements had been negotiated at either industry level or mine level rights of access had not always been honoured.

405. The witness drew a distinction between different situations which existed in relation to different types of mines, i.e. those gold and coal mines whose owners belonged to the Chamber of Mines (COM) with which recognition agreements had been obtained; those members of the COM at which no agreement on recognition had been reached; and non-members of the COM.

406. The witness then gave evidence concerning a clause in an industry-wide agreement with the COM in 1983 which provided for access by union officials for the purpose of conducting union business "subject to such conditions as individual mine managers may determine" and went on to describe aspects of the way in which that provision had been used prior to the negotiation of a new agreement on the subject in 1991.

407. The witness pointed out that it had been necessary to negotiate agreements at mine level concerning access and that these negotiations had given rise to the exercise by mine managers of a discretion to impose a wide range of conditions and rules on the use by the union of the facilities. He quoted examples of such conditions, namely:

- restriction of union officials' access to those periods when the majority of employees were at work;
- not allowing union officials to attend mass meetings;
- prohibition on attendance of union officials at meetings between shaft officials and mine management or allowing such participation only with management permission;
- requiring management approval of agenda;
- restricting speeches at meetings to those of designated speakers, which prevented participation from the floor;
- requiring attendance of management or of security personnel at meetings;
- recording, filming, or video-taping of meetings;
- refusing permission for the use of public address systems or loud-hailers at meetings;
- refusal to allow the distribution of pamphlets at meetings or in hostels;
- bans on outside gatherings;
- prohibition of union activity in hostels; and
- distribution of case reports only with management permission.

408. So far as the 1991 revision of the agreement was concerned, it was stated by the witness that the new provisions allowed union officials reasonable access to mine property for the purpose of conducting union business with management, for consulting with members and officers of the union, to attend meetings, and to conduct education and training. Reasonable notice had to be given by the union and prior permission of management had to be obtained, but access could not be unreasonably withheld.

409. The witness stated that, even after the 1991 revision, mine management still used its powers to impose conditions on access and that it would be necessary to enforce rights by resorting to the Industrial Court by alleging an unfair labour practice. In order to illustrate this contention, copies of letters, memoranda, telexes and facsimiles etc. were submitted which contained conditions of the kind described above attached to permission to hold meetings, distribute forms or pamphlets and conduct elections on the part of the following mine managements: Kloof, Western Deep Levels, Beatrix, Western Holdings, Tweefontein Colliery, and East Driefontein. All but one of these communications was dated late in 1991 or early in 1992.

410. As to the non-COM mines, the position was that access agreements still had to be negotiated with each individual mine's management; and the same applied where there was no recognition agreement.

411. Additional evidence regarding the agreements on access was provided by two witnesses. The first of these indicated that the 1983 agreement had

been much more restrictive than the union (NUM) had wished. It had only been accepted by it reluctantly, in particular because it was to apply only if the union was registered and if its constitution conformed to the requirements of the LRA. Above all, at the insistence of the employers it had only contained an enabling clause which had left a great deal to the discretion of individual mines and their managers.

412. Another witness giving evidence on behalf of employers also referred to the access agreements, confirming that the 1991 agreement was more extensive in scope and expressing the view that, although the earlier rules had provided for the proper procedures to be followed in obtaining access, much of the difficulty had arisen because these had not been properly followed.

413. This witness was not able to provide explanations for some incidents described in evidence, such as the bulldozing of a meeting hall in which an unauthorised meeting had been held or the denial of the use of facilities in June because there was to be a Christmas tree exhibition (sic), as these were not within his knowledge. But he could explain other conditions imposed, e.g. that relating to singing and dancing in respect of which he pointed out that certain types of these activities were regarded as provocative and could threaten order. He added that it was necessary to do everything possible to prevent mounting tension in circumstances where there could be intimidation of alleged strike breakers. More than 350 lives had been lost in labour-related violence and, while he was not attributing blame, it was necessary to take precautions. This also explained the need for the costly maintenance of the armed security system on mines, including armoured vehicles ("caspirs").

414. It was the view of this witness that the imposition of conditions of the kind described in evidence cited above (paragraphs 407 to 409) had been superseded by the 1991 agreement and that the situation had been greatly improved now through the provision in the agreement whereby permission could not unreasonably be withheld. It was this agreement that should now be used, including the opportunity it provided to go to voluntary arbitration.

415. The witness was also of the view that every effort should be made to overcome the problems caused by the fact that employees were housed on mine property, and he supported the policy of encouraging individual home ownership through the provision of land and loans for this purpose.

416. Other evidence in relation to COSATU's allegations was provided by four further witnesses who testified on its behalf. One of these dealt generally with the situation on farms. Pointing to the isolation of farms and the difficulty of holding meetings elsewhere than on the farms, he stated that the police regularly made arrests for trespass in rural areas of persons who entered on land for the purpose of organising workers. He stated that there were also problems over finding venues for meetings as farmers usually refused to allow these to be held on their premises. Further, it was not unknown for workers to be dismissed summarily for holding such meetings. Where venues such as churches and/or schools in the rural areas were available other than on the employers' property, their owners often refused to make them available for trade union meetings by inference because of pressure by farmers.

417. Another witness provided examples from unreported court cases of limitations on access in the agricultural sector. In Rambau and others v. Sapekoe Estates (Pty) Ltd,[4] a shop steward had been ordered to stop organising workers. A strike over this, which the workers considered victimisation, had led to the dismissal of 829 workers; the court held that the strike had been illegal. A similar instance had, the witness indicated, occurred in a case involving Impala Nurseries.[5]

418. Evidence was also given that many domestic servants were forbidden by their employers to receive or entertain visitors other than members of their immediate family. This rule limited access by trade unions to them.

419. Finally, another witness testified to a lengthy dispute over recognition with a textile company in East London which had led to a decision by the courts upholding its case. Other aspects of this dispute are dealt with elsewhere (see Chapter 11, paragraphs 462 to 465), but those that are relevant in the present context include:

- the alleged refusal to meet with union representatives;
- the photographing of workers participating in a strike ballot outside the company's premises; and
- a request which was said to have been made by the company to the Department of Foreign Affairs for the changing of the borders of the Ciskei homeland in such a way as to incorporate its East London plant into that area at a time when the Ciskei did not permit trade unions to operate. This would have resulted in the denial of access by the union to the premises and the workers, which was a facility provided for by agreement in South Africa.

(c) Government interference in trade unions and trade union activities

420. Article 3, paragraph 2, of ILO Convention No. 87 provides that the public authorities shall refrain from any interference which would restrict or impede the lawful exercise by trade unions of the rights protected by the Convention.

421. In its submissions to the Commission on this subject, COSATU relied primarily upon widespread infiltration of trade unions and spying on individual trade unionists. It cited the findings of two commissions of inquiry, and also referred to allegations concerning the establishment or hiring by agencies of government of private firms which were used for this purpose.

422. A number of other allegations was made during the course of evidence presented to the Commission concerning the actions of police in relation to trade unions, trade unionists or trade union activities.

423. No response was made in the initial submissions of the Government concerning the allegations relating to spies or infiltration. There was no direct reference to the matter in heads of argument submitted later by the Government's representatives. The matter might be covered by the general statements referred to above on the absence of evidence on events occurring after February 1990, the role of CODESA, and the futility of expecting "people who were for years conditioned by apartheid to change overnight", although these appear to have been made more particularly in relation to the police.

424. As regards the allegations of spying on and infiltration of trade unions, COSATU referred to the Commission of Inquiry into Alleged Irregularities in the Johannesburg City Council, over which Mr. Justice Hiemstra presided, that reported in July 1991. It was stated that evidence was adduced at the Hiemstra Commission to the effect that officials of the Security Department of the City Council had infiltrated and spied on COSATU,

TGWU, the Municipal Workers' Union of South Africa, the Health Workers' Association, the Media Workers' Association of South Africa, PPAWU and the Unemployed Workers' Coordinating Committee.

425. The following extracts from the conclusions in the report of the Hiemstra Commission[6] were drawn to the attention of the Commission:

> We find the following factual allegations as proved: undercover agents of the Security Department infiltrated trade unions and various voluntary associations active in leftist politics. They reported on confidential proceedings as well as on private affairs and movements of individuals. It seems as if there was electronic surveillance of people but it is not beyond doubt. Information obtained was passed on to Military Intelligence and there was close cooperation with the military. (Emphasis added).

and

> In our view the infiltration of and spying on trade unions, other organisations and individuals perpetrated by the information section of the Security Department, constituted such wrongful intrusion upon the privacy of their targets. Covert eavesdropping on the private meetings and confidential conversations of others, is manifestly unlawful. Can it be different if the intruder were to gain access to those private meetings and became a party to those confidential conversations by dishonest trickery and deceit? Clearly not.

426. The other Commission of Inquiry, presided over by Mr. Justice Harms, was appointed on 2 February 1990. The terms of reference of the Harms Commission were to inquire into alleged incidents of murders and other unlawful acts of violence committed in South Africa and the homelands in order to achieve, effect or promote constitutional or political aims in South Africa in respect of which the judicial process had been completed or which had not been solved or in respect of which the investigations were, owing to lack of evidence, not progressing.[7]

427. COSATU asserted that the Harms Commission had been concerned with the operations of an agency known as the Civil Cooperation Bureau (CCB), a unit of the South African Defence Force. According to COSATU, evidence was presented to the effect that the CCB had identified unions as "internal enemies" and to the effect that a CCB operative concentrated solely on trade unions, with COSATU and the General Secretary of the NUM, Mr. C. Ramaphosa, being singled out for particular attention. According to this evidence, R35,000 had been spent over three months obtaining information on trade unions and on establishing underground networks of informants. The Managing Director of the CCB, Mr. J. Verster, had denied before the Harms Commission that there had been any particular project on trade unions but had said that information was always being gathered concerning them.

428. A senior officer of the South African Police who gave evidence to the Commission on behalf of the Government stated that he had no knowledge of the reports of either of these Commissions of Inquiry beyond what he had seen in newspapers.

429. Additional allegations by COSATU concerned reports appearing in July and September 1991 in three newspapers concerning the creation and/or financing by the Government of a company called the Liaison Bureau for Labour Relations which had been in existence since 1989 and had operated through a member of the academic staff at the Rand Afrikaans University and a firm of attorneys. The Minister of Law and Order, Mr. H. Kriel, had acknowledged on

26 September 1991 that the police had covertly funded this body. The Minister was quoted as saying that "the former security branch [i.e. of the South African Police] attempted through the Liaison Bureau for Labour Relations CC to counter labour unrest and promote sound labour relations". He added: "It must be borne in mind that during 1989 widespread labour unrest occurred which led to disruption and substantial economic losses. Intimidation was rife and relations between workers and employers steadily deteriorated. The South African Police are of the opinion that the activities of the Bureau made a valuable contribution towards improving relations between employers and workers".

430. SACCOLA in its written submissions stated that it regarded the alleged funding of labour relations academics and the Liaison Bureau as an abuse of state funds.

431. Evidence concerning the actions of the police in relation to unions, unionists and union activities was offered by several witnesses. Among the matters referred to by one of these was the seizing of publications and the forcible breaking up of demonstrations. For example, outdoor rallies planned by COSATU to celebrate May Day in 1987 had been banned throughout the country with the exception of one, which had been permitted with severe restrictions. The Internal Security Act and regulations published under it were used continually to prohibit meetings and rallies. The COSATU office had twice been raided (approximately a fortnight and a week before it was fire-bombed: see above, paragraph 373), 400 workers had been detained and some assaulted.

432. The witness also referred to the fact that COSATU had been prohibited in February 1988 from engaging in polical activity. In March of that year, Security Police had raided the offices of COSATU in Pretoria, Vereeniging and Welkom, seizing documents. In May, a COSATU meeting in Port Elizabeth had been held up for more than two hours while security police photographed more than 100 shop stewards present, claiming that the meeting was illegal. There had also been police activity surrounding the COSATU Special Congress in May 1988, the protests organised against the amendments to the LRA and an anti-apartheid conference in September of that year. Altogether 77 COSATU members were in detention in November 1988.

433. Another witness referred to an incident during the strike at BTR Sarmcol in 1985 when workers had been locked out and the police had been called to disperse them. He also referred to difficulties which had been encountered by the union in holding meetings during the State of Emergency and to the use of police to arrest shop-stewards and employees present at one such meeting. Nearly 100 of those on strike had been arrested, of whom only three had been convicted. In his view this confirmed the fact that arrests were used as an intimidatory tactic. There had also been police intervention at the funeral of a trade unionist who had been killed following the incidents surrounding the strike at BTR Sarmcol.

434. This witness also described various acts of alleged harassment and intimidation by police, including those which involved searches at his house for literature or firearms. Initially he had not had any firearms. Later had acquired one and had retained it illegally after delays and interrogation when he had applied for a permit. This firearm had been discovered and he had been fined for its possession. Afterwards, police harassment had continued and had been directed against his 7 year old son, who had been questioned by the police about his father's activities. The child had been found some time later, frightened and confused, after the police had declined to provide information as to his whereabouts. A similar incident had occurred in 1990. The Government's questioning of this witness did not challenge the truth of this testimony.

435. Another witness, referring to the situation in Bophuthatswana, said that there had been widespread harassment, detention and torture of union members. Eighteen members of the union committee had been detained in November 1991 by the Bophuthatswana authorities and had only released after an urgent application had been made on their behalf. They had been dismissed on returning to the mine because they had been absent from work.

436. A witness who was an officer of NACTU refuted the statement that police harassment of trade unionists had ceased after February 1990. He illustrated this fact by reference to three incidents which occurred in relation to him personally: the first concerned an interview with the security police which he was required to have following an application he had made for a passport in April 1990. In the second incident, he had been told by his parents in December 1991 that security police had visited his parents in the middle of the night, looking for him. Thirdly, on 8 January 1992 his house had been raided at 2.30 a.m. by security police, who had, when questioned by him, denied the need for a warrant or to tell him what they were looking for and had searched through all his documents. No evidence was offered by the Government in rebuttal or explanation of this testimony.

437. One other trade union official also referred in evidence to the arrival of security police at his mother's house during the State of Emergency in an attempt to detain him. After being informed of this, he had decided to continue his union work away from his union office.

438. The attention of the Commission was also drawn by COSATU to two instances in which the courts had set aside the use of search warrants in relation to trade union matters, namely Naidoo v. Minister of Law and Order,[8] and Cheadle Thompson and Haysom v. Minister of Law and Order.[9]

439. In response to a question from COSATU's representative, the senior police officer already mentioned said that he had been assured by the Crime Intelligence Unit that the activities of spies in relation to trade unions as mentioned in the Harms Commission report had come to an end.

440. In relation to suggestions that the police had adopted an anti-COSATU attitude, the witness said that no such allegations had been made to him and, if made, would be investigated.

441. In response to questions from members of the Commission, the witness doubted whether there had been any particular abuse in rural areas or in relation to farmworkers. He took the view that all complaints presented would be investigated and outlined the procedure for investigating allegations against police officers, pointing out that the investigating unit was always different from that against which allegations were made. If an independent authority for such investigations was thought necessary, this could be referred to the Goldstone Commission.

(d) Government funding of UWUSA

442. It was common cause between the parties that the Government provided funding for UWUSA, as alleged by COSATU, disclosed in newspaper articles in mid-1991 and conceded in a statement by the Minister of Law and Order, Mr. A. Vlok, who disclosed that through the police a sum of R1.5 million had been paid to that trade union organisation while stating that this had been designed to promote labour stability and combat violence and intimidation.

443. An investigation had been ordered into the affairs of UWUSA by the Minister in 1988. Another had been undertaken, at the instigation of the Inkatha Institute, under Mr. Gavin Woods. When questioned about this, the witness who appeared on behalf of UWUSA indicated that he had no knowledge of it. As to the financing itself, he said that it was "difficult to deny and difficult to accept" (sic). An internal investigation was under way.

444. One witness stated that when the facts about the funding of UWUSA became public knowledge, NACTU viewed this as part of the Government's strategy to undermine the democratic trade union movement and in the process create conflict in the factories to dissuade workers from being involved with the democratic trade unions. This was regarded as a very serious violation of trade union rights and NACTU had considered lodging a complaint to the ILO until it became aware that the matter could by dealt with by the present Commission under its extended terms of reference.

445. SACCOLA, in its written submissions, supported the independence of collective organisations and condemned the utilisation of state funds to further the interests of trade unions or employers' organisations.

446. No reference was made in the initial response of the Government to COSATU's allegations. However, in its heads of argument at the conclusion of the Commission's hearings the Government stated that the State President had undertaken to ensure that no unions were provided with financial support by the South African Government. A copy of a statement by the State President was tendered. This indicated that an investigation had been instituted in 1989 into the extent of secret funding which was taking place in the context of the Government's campaign against sanctions. The State President had undertaken in March 1990 that such funding would be reviewed and reduced. Such funding was now being kept to the minimum necessary until its abolition could be authorised in the context of the ending of sanctions. The statement clearly indicated that UWUSA had received funds secretly from the Government through the police. However, such funding had now been stopped. It was conceded that this might have occurred more rapidly.

447. The conclusions of the Commission on the matters dealt with in this chapter are contained in paragraphs 671 to 707 below.

Notes

[1] For further details, see Chapter 1, footnotes 7, 8 and 9.

[2] National Automobile and Allied Workers Union v. Pretoria Precision Castings (Pty) Ltd (1985) 6 ILJ 369 (IC); Marievale Consolidated Mines Ltd v. The President of the Industrial Court and others (1986) 7 ILJ 152 (T); SA Laundry, Dry Cleaning, Dyeing and Allied Workers Union and others v. Advanced Laundries Ltd t/a Stork Napkins (1985) 6 ILJ 544 (IC); Mtshamba and others v. Boland Houtnywerhede (1986) 7 ILJ 563 (IC); SA Diamond Workers' Union v. The Master Diamond Cutters' Association of South Africa (1982) 3 ILJ 87 (IC); General Workers Union and another v. Dorbyl Marine (Pty) Ltd (1985) 6 ILJ 52 (IC).

[3] (1986) 7 ILJ (IC).

[4] (Case No. 7080/91, Transvaal Provincial Division; judgement of Mr. Justice Goldstein.

[5] Case No. 88/8667, heard in the Witwatersrand Local Division in 1985).

[6] Report, Chapter 5, p. 75 and p. 80.

[7] Government Gazette No. 12286, Proclamation R 227, 2 February 1990.

[8] 1990 (2) SA 158 (W).

[9] 1986 (2) SA 279 (W).

CHAPTER 11

COLLECTIVE BARGAINING

448. Article 4 of Convention No. 98 promotes voluntary negotiation between employers or employers' organisations and workers' organisations of terms and conditions of employment by means of collective agreements. Much jurisprudence has been developed around this fundamental principle with a view to protecting the autonomy of the parties to the negotiations and to restricting interference by the authorities in the bargaining process or in the content of freely concluded collective agreements. Another ILO instrument, the Workers' Representatives Recommendation, 1971 (No. 143) specifies practical facilities to be accorded to workers' representatives, including trade unions and their officials, in order to enable them to carry out their activities promptly and efficiently. The assurance of such facilities to unions for recruitment and bargaining purposes has been consistently upheld by the ILO supervisory bodies.[1]

(a) Ministerial interference in industrial council bargaining

449. As explained in Chapter 6 above, one of the purposes of registered workers' and employers' organisations forming industrial councils is to provide a forum for collective bargaining. Once such councils have negotiated collective agreements they must transmit copies to the Minister under section 31 of the Labour Relations Act (LRA). He then may declare, by notice in the Government Gazette, that such agreements are binding. Section 48(1) of the LRA states:

> 48(1) Whenever an industrial council transmits to the Minister any agreement such as is referred to in section 24, entered into by some or all of the parties to the council, the Minister may, if he deems it expedient to do so, at the request of the council made either at the time of such transmission or at any time thereafter -
>
> (a) by notice in the Gazette declare that from a date and for a period fixed by him in that notice, all the provisions of the agreement, as set forth in that notice, shall be binding upon the employers who and the employers' organizations and trade unions which entered into the agreement and upon the employers and employees who are members of those organizations or unions;
>
> (b) in a notice published under paragraph (a) or by notice in the Gazette at any time thereafter and from time to time declare that from a date and for a period fixed by him in that notice all the provisions of the agreement, or such provisions thereof as he may specify, shall be binding upon all employers and employees other than those referred to in any relevant notice published under paragraph (a), who are engaged or employed in the undertaking, industry, trade or occupation to which the agreement relates, in the area or any specified portion of the area in respect of which the council is registered;

450. According to COSATU, in exercising his discretion to promulgate industrial council agreements, the Minister had refused to declare agreements binding because they were regarded as politically unacceptable. As background, COSATU explained that the courts had held that concluded but

non-promulgated agreements had no binding force on the signatories: the Appellate Division of the Supreme Court had held that an industrial council agreement "only becomes effective if and when the Minister deems it expedient to declare it binding by notification in the Gazette".[2]

451. The examples cited by COSATU of refusal to promulgate agreements over the last three years were: first, in the second half of 1988 the Minister refused an agreement concluded by the Industrial Council for the Automobile Manufacturing Industry, Eastern Province because it provided that 21 March (the anniversary of the Sharpville massacre) and 16 June (the anniversary of the start of the Soweto uprising) be paid holidays for employees in the industry instead of two public holidays.[3] Secondly, the same Industrial Council attempted to have a new agreement gazetted in late 1989 but it was returned in May 1990 with a request that certain technical difficulties be addressed. When these were being rectified the Council took the opportunity to extend the agreement which was due to expire on 30 June 1990 to 30 June 1991, but the Minister then refused to declare the agreement binding retrospectively to 1 July 1989, despite the fact that the parties to the agreement pointed out to him that nothing in the Act disallowed such a declaration and despite the fact that he had so declared in respect of a number of other agreements. Thirdly, in 1989 the Minister had refused to declare an agreement binding on parties and non-parties in the iron and steel industry because it included a provision for paid holidays which he considered politically unacceptable.

452. The Government, in its written reply, argued that COSATU was incorrect in stating that agreements between management and labour were not enforceable at common law if the Minister had not promulgated them. It argued that COSATU had misread the case law. It cited a 1989 case[4] which held:

> If the Minister takes that step (i.e. declares the agreement to be binding) the agreement may well assume the character of subordinate legislation, but unless and until he does so the parties are bound by their agreement not because of any particular status conferred upon it by the provisions of the Act, but on the ordinary principles of the law of contract ...

SACCOLA, in its written submissions, agreed with the Government on this point.

453. The Government also placed emphasis on a recent decision of the Appellate Division in the NUM v. ERGO case.[5] It stated that most agreements arrived at between employers and employees or employees' organisations were binding on them by virtue of the common law. Either party could sue the other in the Supreme Court for specific performance. It added that if either party were dissatisfied with the decision of the Minister not to publish or approve an agreement, that party was entitled to take the Minister on review on the ground that he had exercised his discretion incorrectly.

454. The Government stated that this aspect of the allegations was also part of the CODESA deliberations and that it was thus inappropriate for the Government to deal with it in any greater detail.

455. In evidence on this point, the representative of the Minister of Manpower stated that the Minister's policy in exercising his discretion to refuse gazetting of agreements was: to determine that the parties to the agreement were sufficiently representative of employees and employers; to take into consideration consultation with non-parties prior to, during and after negotiations; to take into account government policy objectives such as deregulation; and to see that the agreement fitted into broad economic policy. In the examples given of refusal, it had been considered that the

overall number of public holidays should be a matter to be negotiated in the new constitutional dispensation to avoid the proliferation of paid public holidays. He added that the question of paid public holidays was in fact receiving attention in CODESA.

456. A representative of the National Manpower Commission (NMC) explained that the Labour Appeal Court had had occasion to pronounce on the tactics and the limitations on collective bargaining activities. The Appellate Division of the Supreme Court had now settled the law in the ERGO case referred to above. There it was held, on appeal, following a return to work of miners after a two-week strike in August 1987 and the coming into effect of an agreement between the parties on 28 August, that the employer's attempt to negotiate directly with its employees instead of through their union was not justified and constituted an unfair labour practice. It was also held that its implementation of wage increases retrospectively to 1 June for those workers who had abandoned the strike at its behest and its agreement to pay the strikers only back to 28 August when they had resumed work amounted to unequal treatment which the employer could have avoided.

(b) Other ministerial powers

457. The LRA includes other provisions empowering the Minister to interfere with the operation of concluded agreements, including agreements reached under the statutory conciliation board procedure (where no industrial council has jurisdiction). Section 51(12) allows for exclusions to be made:

> 51(12) Whenever the Minister considers that it will be in the interests of persons or in the interests of employers or employees, or in the public or national interest, that all or any of the provisions of any agreement, notice, award or order should not be operative within an area or part of an area described by the Minister by notice in the Gazette, or in respect of any particular class of work in that area or part of that area, he may, in his discretion, at any time, after consultation with the industrial council or conciliation board concerned, or if the conciliation board has been discharged, with the parties who were represented on the conciliation board, or if there is or was no such industrial council or conciliation board, with the parties to the arbitration proceedings which gave rise to the award, or with the group or association of employers which submitted proposals for the making of an order, and with the employees who are affected by such order, by the said notice exclude that area or part of that area or that particular class of work in that area from the operation of all or any of the provisions of that agreement, award, notice or order for such period and subject to such conditions as he may think fit.

458. In reply to a question concerning policy in the making of exemption orders under section 51(12), the representative of the Minister of Manpower stated that the section would be applied in the public and national interest. The Wage Board would usually be asked for a recommendation. There had been very few such applications and consequently a clear policy had not evolved.

459. Section 51A allows a group of employers (but not employees) to ask the Minister to declare binding wages or other conditions of employment proposed by it in an undertaking, industry, trade or occupation in any area where no industrial council is operating. The section reads:

> 51A(1) Any group or association of employers engaged in any undertaking, industry, trade or occupation in any area in respect of which no industrial council is registered in respect of such undertaking, industry, trade or occupation, or, if an industrial council is so registered, the said industrial council has in the opinion of the registrar ceased to perform its functions under this Act, may at any time submit to the Minister proposals concerning the wages or the other conditions of employment of the employees employed in the undertaking, industry, trade or occupation and in the area in question, and request that such proposals be declared binding on all employers and employees engaged or employed in such undertaking, industry, trade or occupation and in such area.
>
> (2) Upon receipt of proposals under subsection (1) and after consultation with the wage board established by the Wage Act, 1957 (Act No. 5 of 1957), the Minister may, if he deems it expedient to do so and if he regards the group or association of employers in question as sufficiently representative of employers engaged in the relevant undertaking, industry, trade or occupation and area, make an order in accordance with such proposals.
>
> (3) After making an order under subsection (2) the Minister shall cause to be published in the Gazette a notice setting forth the provisions of that order, and from a date specified in the notice the said provisions shall be binding upon employers and employees in the undertaking, industry, trade or occupation and area as defined in the order.

460. The representative of the Minister of Manpower stated that the Minister's policy in exercising the powers conferred on him by section 51A was that the industry concerned had to be sufficiently organised and that the parties concerned were sufficiently representative. Where possible, known trade unions of substance should be consulted.

(c) Interference in conciliation board proceedings

461. One of COSATU's witnesses referred to several incidents in which conciliation board applications for collective bargaining purposes had been rendered invalid on the basis of technical objections. This resulted in the unions not being able to pursue disputes through either the courts or by industrial action. NUM, for example, had submitted an application for a conciliation board in respect of a certain dispute, signed by a local officer of the union and not by the National President. The board was rendered invalid on the basis of this technicality, despite the fact that the officer had signed with the full knowledge and authorisation of the union's executive.

(d) Recognition agreements

462. The same witness described the struggle of the South African Clothing and Textile Workers Union (SACTWU) for recognition at a textile factory in East London. In 1987 the union requested the company to recognise it as the sole bargaining representative of its employees. The company required it to prove that it had recruited a majority of weekly paid employees. The union complied and submitted signed stop-order forms in

support of its claim. The company proceeded to change the size and composition of the bargaining unit and insisted that the union recruit a majority of the weekly and monthly paid employees (excluding managerial and supervisory staff). The union again complied and submitted signed stop-order forms to prove that it represented the majority of the entire workforce. The company then required the union to prove that its members at the plant were all paid-up members of the union, but this could not be done since the company had failed to grant the stop orders to facilitate collection of membership dues. The union's constitution permits signed-up workers to be considered as members and an integral part of the union until such time as an employer agrees to effect stop-order deductions, and yet the company refused to recognise SACTWU. A final objection raised by the company was that the union was not registered for the correct magisterial district. SACTWU was not registered for East London at that time because, being an amalgamation of unions, it had not yet been registered although one of its constituent unions had been. It considered that there was nothing in the law to prevent recognition of SACTWU whether it was registered for that area or not. In practice, all other textile factories had recognised it.

463. SACTWU applied for a conciliation board to resolve the dispute. One was set up. However, the employer was granted leave to apply for review of the establishment of the board before the Supreme Court. The union succeeded. But again the company appealed, according to the witness to avoid having to grant recognition. The union also succeeded on appeal, but the employer refused to meet at the conciliation board for one year while the matter was before the Supreme Court. As a result of these attempts to avoid meeting with the union, the union organised a strike ballot. The company photographed all workers who cast votes outside the company's premises and the police sought to intervene to stop the ballot. In a further attempt to avoid recognition, the company approached the Department of Foreign Affairs with a request that it change the borders of Ciskei in such a way as to incorporate its East London plant and thus avoid being covered by the South African LRA. The union finally decided to comply with the company's "paid-up members" precondition for recognition and conducted a collection of dues by hand outside the plant from all shifts.

464. When presented with proof of membership, the company agreed to a meeting on 9 November 1989. At this, it demanded that the union confirm its representativity through monthly hand collections of dues outside the plant. It insisted that the recognition issue wait until the Ciskei application was finalised. It demanded that it should be entitled to reopen any issues concerning recognition that had been previously agreed upon. And it stated that it would meet with the union only once a month. The union found the collection of dues by hand particularly onerous, given that the union had no facilities in the factory such as an office, or nearby, and the company refused it access to collect dues on the premises. In addition, a state of emergency was in force prohibiting any congregation of persons so it was difficult to gather dues outside the premises. The shift system compounded the union's practical difficulties. However, when negotiations on a recognition agreement began, it was clear that the company had no intention of concluding an agreement. The union considered a second strike ballot. However, it decided against this in view of the uncertainty surrounding reinstatement of strikers after dismissal. It finally approached COSATU to contact two other companies which held substantial interests in the company in question with a view to securing their intervention to settle the matter. This recognition struggle had lasted three years.

465. This protracted dispute illustrated the susceptibility of the South African legal system to manipulation by an employer to frustrate the efforts

of a trade union to engage in legitimate trade union and collective bargaining activities.

(e) Facilities for collective bargaining

466. COSATU stated that the LRA did not provide organisational rights or facilities for trade unions such as: access to employers' premises for union business; access for conducting a strike ballot;[6] material facilities such as offices or halls for union meetings; recognition of elected workers' representatives; time off for union business or to attend union training courses; automatic check-off; and access to information for purposes of negotiations or consultations. According to COSATU, the lack of these facilities was particularly felt on the mines and in agriculture where workers also lived on the employers' property. It was therefore with particular reference to these sectors that COSATU called for a right of unions to have access to their members. Otherwise, it recognised that some controls - such as an access "at reasonable times" requirement - might not infringe trade union rights.

467. Several witnesses called by COSATU gave evidence as to the problems their unions had faced, both from an organisational and strike angle, because of the refusal of companies to allow them to enter premises to contact workers. A SACCOLA representative also admitted that lack of access had given rise to problems, although he pointed out that the 1991 NUM/Chamber of Mines "Access and facilities on mines agreement" was aimed at permitting reasonable access to mine property for union business, access that could not be unreasonably withheld. COSATU, on the other hand, maintained that clause 7 of that agreement - which left the practical expression of the rights listed therein up to the mine managers and union officials and members - left the day-to-day implementation of those rights susceptible to different interpretations from mine to mine. Further description of the problem of access appears in Chapter 10 of this report.

468. In its written submission, SACCOLA cited decisions of the Industrial Court indicating that an employer should grant access for the purpose of conducting a strike ballot[7] or in an emergency to promote sound industrial relations[8] or for purposes of holding a mass meeting[9] in the circumstances of the cases concerned. It stated that rights of access should continue to be regulated through collectively bargained agreements. The Industrial Court, through its unfair labour practice jurisdiction, should continue to adjudicate on the denial of appropriate rights of access and develop guidelines on the granting of such rights.

(f) The impact of other statutes on collective bargaining

469. COSATU claimed that the provisions of three other statutes undermined collective bargaining by empowering employers (but not employees) to appoint representatives to various committees. First, the Machinery and Occupational Safety Act, 1983, creates a system of safety representatives and safety committees to conduct workplace inspections and report safety hazards and to make representations to employers on safety issues: under sections 9 and 11, the employer is to designate full-time employees as safety representatives. The unions' experience was said to be that the existence of management-appointed representatives and committees had undermined the

establishment of elected health and safety structures. Secondly, the Mines and Works Act, 1956 - now the Minerals Act, 1991 - also requires (by virtue of Regulation 2.18.1 issued under the Act) the appointment by mine management of safety representatives. The NUM experience had been that they have hindered the negotiation of collective agreements for the creation of health and safety structures. Thirdly, the Manpower Training Act, 1981, allows training boards to be accredited even though workers have lesser representation on them than employers. This, according to COSATU, had in fact been the practice of the Registrar of Manpower Training despite the requirement of section 12A(3) that any group of employees has the right to negotiate with its employer over the establishment of such a board. Despite COSATU's proposals to the Minister of Manpower that the Act be amended to provide for equal employer-employee representation, no response had yet been received.

470. The Government stated that its approach to the three above-mentioned statutes was that it sought consensus on the part of labour and management in these spheres. It believed that such consensus could be achieved. It noted, however, that each party was entitled to put forward its point of view for consideration so that the matter could be dealt with. It added that COSATU's representations to the Minister of Manpower on equal representation on manpower training boards had been responded to and that COSATU must be aware that this matter was still under consideration by the Minister.

471. The conclusions of the Commission on the matters dealt with in this chapter are contained in paragraphs 708 to 722 below.

Notes

[1] For further details, see Chapter 1, footnotes 7, 8 and 9.

[2] S v. Prefabricated Housing (1974) (1) SA 535(A).

[3] The Public Holidays Act provides for a set number of public holidays in South Africa. In addition to Christian religious holidays, the dates specified commemorate events important to the White community.

[4] Nouwens Carpets (Pty) Ltd. v. National Union of Textile Workers (1989) (2) SA 363.

[5] NUM v. East Rand Gold and Uranium Co. Ltd. (1991) 12 ILJ 1221.

[6] Kloof Gold Mining Company v. NUM (1987) 8 ILJ 99(T): where it was held, on appeal, that the fact that a union had the right and duty to organise a proper strike ballot did not mean that the legislature intended to give it the right to hold a ballot on the employer's property.

[7] FAWU v. Clover Dairies (1986) 7 ILJ 697 (IC).

[8] Clover Dairies supra.

[9] NUM & Others v. Buffelsfontein Gold Mining Company Limited (1991) 12 ILJ 346 (IC).

CHAPTER 12

PROTECTION OF WORKERS EXCLUDED FROM THE LABOUR RELATIONS ACT

472. Subject to the possiblity of excluding members of the armed forces and the police, Convention No. 87 applies to all workers "without distinction whatsoever". The scope of Convention No. 98 is similar, save that it does not deal with the position of public servants engaged in the administration of the State. Public servants in general are, however, covered by the Labour Relations (Public Service) Convention, 1978 (No. 151).

(a) Workers excluded from the Act

(i) Farmworkers

473. Farmworkers form an important part of the labour force. Agriculture is a major economic activity in South Africa. Farms range in size from small holdings to vast agri-business enterprises. Depending on the area, they may be widely scattered, having great distances between them. Virtually all of them rely on Black labour. They are overwhelmingly owned and managed by Whites.

474. Farmworkers are excluded from the provisions of the Labour Relations Act (LRA) as well as from those of the Basic Conditions of Employment Act, 1983, the Wage Act, 1957, and the Unemployment Insurance Act, 1966. Their employment relationship is thus governed almost exclusively by South African common law.

475. COSATU submitted that in terms of the common law, an employer could dismiss an employee for any reason whatsoever "with no obligation to reveal his reason to the employee, much less than justify it", as long as adequate notice had been given. Even where insufficient notice had been given, a farmworker's remedy was invariably limited to a claim for damages. COSATU added that farmworkers should at the very least be covered by the Basic Conditions of Employment Act to ensure that they had decent minimum conditions of employment and by the LRA to ensure that they were protected against unfair dismissals.

476. A witness from the South African Agricultural Union (SAAU), a member organisation of SACCOLA, stated that although these allegations were correct, farmworkers would enjoy the protection of the above-mentioned labour laws within the near future.

477. A witness for COSATU gave evidence that the vast majority of farmworkers in South Africa lived on the farm where they were employed and that their right to accommodation was either a term of their contract of employment or dependent upon a continuing employment relationship referred to as tied housing. The same witness added that most farmworkers were neither remunerated entirely by cash wages nor were they labour tenants in the true sense of the word. Rather cash wages were supplemented by the provision of housing for the farmworker and his family members and/or the right to use an agreed portion of the land in order, for instance, to grow his own crops and to graze his own livestock. Cash wages were further supplemented by the provision of food and/or tobacco and sometimes even alcohol through the "tot system", namely the payment of wine as part of a farmworker's remuneration.

478. The witness from the SAAU did not refute the above allegations. However, he said that farmers in general were pressing for the "tot system" to be abolished altogether. He added that the fact that a certain percentage of the farmworker's remuneration was in the form of goods protected workers against inflation.

479. The witness for COSATU contended that the lack of legislative protection was responsible for the fact that the working conditions of farmworkers were abysmal, as were their living conditions, and that most of their homes were without electricity or water. In his submission, the most powerful weapon in the hand of the farmer, which in most cases undermined freedom of association, was the unrestricted right of the farmer to dismiss. He added that there was an arsenal of legislation to effect either directly or indirectly the eviction of dismissed farmworkers from the farm on which they resided, such as ordinary civil ejectment proceedings and criminal proceedings in terms of the Trespass Act, 1959, and the Prevention of Illegal Squatting Act, 1951. He referred to the hardships of dismissal and immediate eviction which not only involved a loss of the farmworker's employment and accommodation, including that of his family members, but also access to pasture, land on which to grow crops, and food.

480. The witness from the SAAU rejected COSATU's allegations with regard to the dismal living and working conditions of farmworkers. He added that it was incorrect to allege that, in the event of a dismissal, the farmworker lost all rights such as the right to grow crops and to occupy housing. By the common law, nobody could be evicted in such circumstances unless he had been given a reasonable time to find alternative accommodation. The witness then referred to the contract of employment which he alleged, although more often made orally than in writing, gave a great deal of protection to a farmworker as it provided without exception for working hours, meal breaks, time off from work on Sundays and public holidays, annual leave, sick leave and overtime. He maintained that this sort of contract, whereby farmers explained to farmworkers their conditions of employment in detail before engaging them, was concluded regularly.

481. On this latter point, the COSATU witness argued that the normal practice was for a farmer to employ a farmworker and then to tell him what his wage was, and that there were few agreements, verbal or otherwise, which were concluded with farmers which governed terms and conditions of employment. This witness concluded that the question of a farmworker's terms and conditions of employment was thus entirely at the discretion of the farmer with the result that in most instances, these conditions were way below the acceptable minima.

482. The same witness pointed out that physical violence against farmworkers and their family members, as a means of enforcing discipline and as a means of victimising farmworkers who sought to improve their wages and living and working conditions, occurred on a fairly regular basis. He referred to farms as "total institutions" from which farmworkers and their family members could not escape after hours from the authority structures which regulated their lives during the day and where the farmer exercised complete control over virtually all aspects of the farmworkers' lives through the fear of violence and/or dismissal and eviction.

483. The witness for COSATU also referred to specific instances of physical violence exercised on farmworkers which he alleged represented only part of the total number of such instances since the majority of farmworkers were afraid and lacked the means to institute proceedings for damages against the farmer. According to the witness, in reality, farmers were seldom prosecuted, and even when they were prosecuted and found guilty, the sentences

handed down were often extremely light. In the result, only a fraction of all cases of violence were ever reported by farmworkers.

484. The following are two examples of serious assaults on farmworkers submitted in evidence. In the first case in 1988, a farmer in the Northern Transvaal killed one of his farmworkers for accidentally running over his dog with a tractor. The farmer tied the worker to a tree with wire, and over a period of two days whipped and beat him to death. The farmer was charged, found guilty and given a wholly suspended jail sentence and a fine. In the second case, also in 1988, two farmers, after accusing a farmworker of having stolen their cattle, tied his hands and feet and kicked him to death. They were each fined R1,200 by a Magistrates Court.

485. The witness from the SAAU denied in the strongest possible terms that physical violence occurred on a regular basis. He submitted that this was not a representative picture of the true situation on South African farms. He said that his organisation and the farming community in general condemned violence and fully supported the basic principle that the punishment for such conduct should fit the crime. He indicated moreover that it was totally incorrect and misleading to describe farms in South Africa as "total institutions" and to state that the farmer "controls virtually all aspects of the lives of farmworkers". He said that there was no restriction whatsoever placed on the freedom of movement of farmworkers after hours, that the contract of employment was entered into voluntarily and that the worker had the freedom to decide whether he wished to be involved in agriculture or in any other economic sector. He added that the written testimony of the farmworker which stated the contrary, was, if it was correct, an extreme exception and most definitely not the rule.

486. Evidence was presented by the witness for COSATU on the common use and abuse of child labour in the agricultural sector in South Africa. The witness stated that children came into this sector by virtue of their employment being a condition of a farmworker's family being allowed to reside on a farm or as a condition of continued labour tenancy. He indicated that the main advantage of child labour to farmers was that it was the cheapest form of labour. He indicated moreover that the fact that education was not compulsory for Black children and that farms were isolated greatly encouraged the use of child labour. Although a certain number of farmers provided for schools on the farms themselves, the witness referred to the majority of these as "shacks" where children of different age groups were taught in the same classroom by the same teacher without the appropriate textbooks. He also said that farmworkers' children were expected to pay for this schooling either in kind or by working on the farm.

487. The witness from the SAAU responded that it was incorrect to allege that there was no protection for children with regard to child labour as the Child Welfare Act stated explicitly that no employer may employ a child under the age of 15 years. He categorically denied that the abuse of child labour in the agricultural sector was a common phenomenon. He indicated that children sometimes worked on the farm in the afternoons or during holidays but only for pocket money. He rejected the description of farm schools as "shacks" and said they compared favourably with government schools in towns and cities. Both he and the Government stated that farm schools were administered by the Department of Education and Training and that they must comply with certain minimum requirements in order to obtain registration without which they are illegal.

488. With regard to organising farmworkers, COSATU conceded that there was nothing in South African common law which prohibited farmworkers from forming or joining trade unions of their choice. It submitted, however, that

there was very little which protected the organisations of farmworkers or which protected farmworkers themselves against victimisation including dismissal and eviction for trade union activities, apart from the Manpower Training Act which contained a prohibition on victimisation for trade union activities. It was submitted that this provision was little known and had seldom been used to protect farmworkers.

489. A witness for COSATU stated that the situation on the farms was exacerbated by the fact that trade union officials, office bearers and organisers did not have any legally supported right of access to farms in order to carry out normal trade union activities. According to the witness, in terms of the Trespass Act anybody entering land without the permission of the owner or lawful occupier, unless it was for a lawful reason, committed a criminal offence. Entering land in order to organise workers was not viewed as a lawful reason for the purposes of this statute. The same witness indicated that farmers usually refused to allow any trade union meetings on their premises.

490. Referring to collective bargaining, the witness said that whilst this is not prohibited within the agricultural sector, the fact that no statutory collective bargaining structures existed in respect of farmworkers made their right to bargain collectively fairly meaningless. The witness alleged, moreover, that whilst farmworkers were not prohibited from striking in terms of the criminal law, participation in a strike would constitute a delict, a breach of contract and a ground for dismissal and eviction.

491. Thus it was not surprising, in the view of the witness, given all these factors, that fewer than 5 per cent of farmworkers in South Africa were unionised.

492. The witness from the SAAU asserted that his organisation and its members, being South African farmers, recognised the principle of freedom of association to the fullest, that most of the above allegations by COSATU were unfounded and that those with merit would be resolved once the proposed extension of labour legislation to agriculture was completed. Questioned as to whether his organisation accepted the principle of collective bargaining for farmworkers, the witness answered that although his organisation did not welcome trade unions, it had no objection to collective bargaining for farmworkers. On further questioning, the witness conceded that his organisation did in fact have difficulties with regard to structures such as Industrial Councils since he did not see how a single industrial council could negotiate on behalf of all farmers. Regional differences in farming conditions were too great. He added moreover that his organisation had reservations about the extension of the LRA to farmworkers due to the close, personal relationship that existed between farmers and farmworkers. The witness contended moreover that unions were trying to blame farmers for their own inability to recruit and organise farmworkers effectively and that the reasons for their inability included the following:

- the fact that workers did not experience a need to join trade unions;

- the geographical isolation of many farms; and

- the cost of creating an infrastructure to serve the interest of farmworkers effectively was enormous and not viable from an economic point of view.

493. With regard to the extension of labour legislation to cover farmworkers, the witness for COSATU stated that after refusing this extension for many years, the Minister of Manpower had asked the National Manpower

Commission (NMC) in 1990 to investigate extending laws to farmworkers. After conducting this investigation in the first half of 1991, the NMC recommended that the Basic Conditions of Employment Act, the Unemployment Insurance Act and the LRA should be extended as soon as possible to farmworkers with specific amendments to take into account the special conditions of agriculture. According to the witness, since the completion of this investigation, there had been a lack of commitment on behalf of the Department of Manpower to implement the legislation. This constituted a serious disregard for the process of negotiation which had taken place between the agricultural employers and employees during the NMC investigation. In the view of the witness, this was evident not only from the delays in implementing the legislation but also from the fact that many of the recommendations made by the NMC were changed and watered down by the Department of Manpower. He added that these delays were also due to representations made independently by the SAAU to the Minister of Manpower. SACCOLA, in its written submissions, supported the NMCI's recommendations. However, it stated that account would have to be taken of the characteristics of the small private farmer, such as lack of resources.

494. The witness from the SAAU stated that the General Council of his organisation had decided in November 1991 to approach the Minister of Manpower with a proposal to prepare a single comprehensive Labour Act for agriculture. His organisation preferred a single, separate Act to apply to farmworkers instead of extending the various existing Acts to them piecemeal because this would be much simpler. He explained that since the NMC had recommended substantial amendments for farmworkers to the three Acts referred to above, the result would be that these Acts would be marred with numerous exceptions for the agricultural sector. He concluded moreover that separate labour legislation for agriculture was commonplace in many countries of the world.

495. Questioned on this matter, the representative of the Minister of Manpower recognised that the Minister had stated on 27 April 1990 that a Basic Conditions of Employment Bill for agricultural workers would be introduced in 1991. The Bill was prepared and referred to the NMC and the text agreed within the NMC was examined in committee during the 1991 Parliamentary session. It was tabled in Parliament on 27 January 1992. It had then been the first item on the Parliamentary Order Paper. However, following a meeting between the SAAU and the acting Minister of Manpower on 20 November 1991, at which the SAAU had asked that the Bill be deferred in favour of comprehensive legislation covering all aspects of agricultural labour, the Bill had been moved to a lower position on the Order Paper. It was the witness's understanding that if the SAAU could not reach agreement with COSATU on their proposal the Basic Conditions of Employment Bill would be proceeded with promptly. The same witness added that a Bill to extend the unemployment insurance fund to farmworkers was at present being examined in a Parliamentary Standing Committee.

(ii) Domestic workers

496. The existence of a large number of domestic workers is a distinctive feature of the South African labour force. Most White households, and many non-White households, employ at least one domestic servant. Evidence given to the Commission estimated the total number of domestic workers in South Africa to be of the order of one million.

497. Domestic workers, like farmworkers, are excluded from the provisions of the LRA, the Basic Conditions of Employment Act, the Wage Act and the Unemployment Insurance Act. Their employment relationship is thus, as is the case for farmworkers, governed almost exclusively by the common law.

498. A witness for COSATU submitted that, as a consequence, an employer could dismiss a domestic worker for any reason whatsoever as long as he gave his employee reasonable notice and that even where insufficient notice was given, a domestic worker's remedy was limited to a claim for notice pay. The domestic worker furthermore had no common law right to leave pay or time off and had a very restricted entitlement to sick pay.

499. The witness went on to describe generally the working conditions of the vast majority of domestic workers. She stated that their working conditions were set by employers and there was little or no bargaining over wages and general terms and conditions of employment. One of the consequences was that most domestic workers worked more than 12 hours per day, seven days a week with one afternoon off per week and a short period of leave over the Christmas-New Year period which, however, was not paid. According to the witness, these long working hours had a detrimental impact on domestic workers' social and family lives. Although wages varied slightly as a function of the different regions and the income of the employers, the witness said that the average wage for a domestic worker was in the range of R200 per month. She stated that in addition to these dismal working conditions, domestic workers, most of whom resided on their employer's premises, had to put up with accommodation that was frequently squalid with little or no access to decent bathing, toilet and cooking facilities. She emphasised, however, that having a room regardless of its size or condition was of great importance for domestic workers especially in the context of the acute housing shortage in most Black townships which meant that most domestic workers who secured employment, especially those from the rural areas, accepted living conditions as they were presented to them.

500. The witness pointed out that another reason why domestic workers needed to be covered by labour legislation was because of the frequent use of physical violence against a large number of workers which they did not complain about to their employers because of their fear of dismissal. They often did not report these incidents to the police, again because they feared dismissal, or because they feared that no action would be taken by the police.

501. The witness for COSATU then touched upon the problems relating to organising domestic workers which, she stated, included the following. First, the majority of domestic workers were poorly educated if not illiterate and there were accordingly problems in conveying the purpose of unionisation to such workers. Secondly, since the majority of domestic workers were employed in excess of 12 hours a day, this left them with virtually no time to participate in union activities. Furthermore, these workers were employed on terms set and controlled by their employers which meant that they were not in a position to make demands regarding time off for participation in union activities. Finally, since there were no legislative measures protecting their freedom to associate, domestic workers were often not willing to participate in union activities at the real risk of losing their employment and living benefits.

502. With regard to legislative protection for domestic workers, the witness stated that COSATU had participated in a subcommittee of the NMC which was established in 1990 to investigate the possible extension of labour legislation to domestic workers. COSATU's demand was that domestic workers should be covered by the provisions of the LRA, the Basic Conditions of Employment Act and all other ancilliary Acts and that appropriate provisions should be included in the legislation to cater for the particular circumstances of domestic workers.

503. Despite this recent investigation, the witness expressed the opinion that the Government had delayed its commitment to implement these legislative

changes. This was because an investigation had been conducted in the early 1980s, on the incorporation of domestic workers under the existing labour legislation. This had led the then NMC, to which COSATU was not a party, to recommend the extension of existing labour legislation to domestic workers in 1984. This recommendation was never published. No steps were taken to implement it. Moreover, after investigations conducted in 1990 and 1991, the NMC published a further recommendation in September 1991 to the effect that domestic workers be incorporated into the LRA, the Basic Conditions of Employment Act and the Wage Act. The Department of Manpower however had indicated that it would not be able to respond to this recommendation until the second half of 1992.

(iii) The public sector

504. In its submissions concerning the public sector, CSOATU provided information relating to the central public service comprising personnel appointed under the Public Service Act, 1984, various Education Acts governing respectively White, Coloured, Indian and Black education, the Post Office Service Act, 1974, the Nursing Act, 1975, the Police Act, 1958, and the Prisons Act, 1959. No submissions were put to the Commission concerning members of the defence forces. They are therefore not dealt with by the Commission.

505. According to this information, public servants (except for the police force and prison service) may establish and join staff associations and trade unions, which may be registered under the LRA provided they are composed wholly of persons employed by the State - a limitation whose removal has been provided for by an amendment enacted but not yet brought into force. Members of the police force and prison service may establish and join trade unions only with the permission of the Commissioner of Police or Prisons as the case may be.

506. The other provisions of the LRA do not apply to public servants.

507. COSATU raised the following issues concerning the position of public servants.

508. The various Acts listed above define misconduct to include attempts to secure intervention, through any person who is not in the employment of the department, in relation to his or her position or conditions of service. COSATU suggested that the effect of these provisions was that trade union representatives must belong to the occupation in which the trade union functioned, and they therefore interfered with the right of public servants to elect their representatives in full freedom.

509. Secondly, as regards the right to strike, in the absence of applicable legal provisions the common law applied to employees under the Public Service Act, the various Education Acts and the Post Office Service Act. Accordingly, a strike constituted serious misconduct entitling the authorities to dismiss summarily. In most cases, the statutory disciplinary procedures must first be exhausted, but in the case of "employees" (as opposed to "officers on the fixed establishment") under the Public Service Act only the basic principle of fair procedure, audi alteram partem (hear the other side), must be respected. COSATU contended that officers on the fixed establishment were mostly White and employees were mostly Black.

510. Both the Police Act and the Prisons Act prohibited strikes and empowered the authorities to dismiss summarily members of the service who engaged in a strike.

511. Thirdly, no collective bargaining procedures existed for public service employees. All that existed was in some branches a formal procedure, and in others an established practice, whereby staff associations - which may or may not be formally recognised by the employing authority - were given the opportunity to make representations on salaries and other conditions of employment. For those employed under the Public Service Act, an Advisory Council was established where recognised staff associations may make such representations. The Coloured Persons Education Act made no such provision, though in practice the education authorities entertained representations from teachers' associations. The Indian Education Act did provide for the recognition of teachers' associations, and representations from them were entertained as a matter of practice. The Education and Training Act (which governs Black education) provided for the recognition of associations of teachers for the purposes of consultation, and the Education Affairs Act (governing White education) contemplated recognised staff associations as intervening on behalf of White teachers in respect of conditions of service. Representations from such associations were entertained in practice. Finally the Post Office Service Act made provision for a Staff Relations Council which included officers nominated by the recognised staff associations and the Post Office did entertain representations from them in respect of salaries and other conditions of employment.

512. Evidence was given to the Commission by a representative of the Public Servants Association of South Africa (PSA). This union represented persons appointed under the Public Service Act. There were 412,464 such persons. The Central Public Service as a whole, comprising also those serving under the other Acts listed above, totalled around 748,300 persons. Formerly an all-White union, the PSA opened its membership to other races some five years ago.

513. Questioned on the racial composition of the public service the witness stated that, while those classified as labourers were non-White, until 1980 there had been veiled job reservation in other categories. Things had changed very slowly since then. Of the clerks approximately 27 per cent were non-White and in other middle groups about 37 per cent. There were no non-White heads of department. The Commission further noted from statistics published in Hansard that in 1989 of those in "senior employment" in the public service, a total of 99,685, 80.5 per cent, were White.

514. The witness explained that the government authorities which took final decisions affecting the rights and interests of officials were the Cabinet, Minister of Finance, Minister of Administration, Commission for Administration and the individual Departments and their Ministers. There was a move towards greater autonomy of Departments, which were becoming more important in the field of labour relations.

515. The Commission for Administration was at present the only authority that could, under the terms of the relevant statute, recognise an employee organisation. Eleven organisations representing 305,100 employees were recognised. However, a survey by the Commission for Administration in 1989 had revealed that there were 42 employee organisations active in the public service. Registration under the LRA was not required for recognition. The conditions for recognition were laid down in the Public Service Regulations. Recognition might be withdrawn if a personnel association failed to comply with such conditions or affiliated with a federation of trade associations without the approval of the Commission for Administration.

516. Recognition gave an association the right to benefit from such facilities as stop orders, access to offices, other facilities and information; the right to make communications to the Commission for

Administration and the right to sit in the Public Service Joint Advisory Council, whose function was to advise the Commission for Administration on matters within its authority under the Public Service Act, legislation or regulations insofar as they affected the public service and other matters that were indicated.

517. However, this Council, which consisted of equal numbers of representatives of the Commission for Administration and the recognised personnel associations, was, according to the witness, "a toothless body, whose advice and decisions are disregarded". He further stated that, "Because the Council is not a forum for collective negotiation it was not used effectively by the State, as employer, for real consultation and advice and was mainly used to defuse requests from the recognised personnel associations while even the consensus decisions of the Council were powerless".

518. For this reason, the recognised employee organisations had relied more and more on informal negotiations, and a practice had evolved of making direct representations in writing to the government authorities and conducting informal negotiations with Ministers, the Commission for Administration and Departments.

519. The witness identified the following shortcomings in the present system:

- legislation concerning the labour relations for the public service is non-existent;

- a formal system for collective bargaining at the central and departmental level does not exist and the Government, as employer, is not legally obliged to negotiate;

- there are no formal mechanisms to settle disputes;

- the existing conditions for recognition limit freedom of association to employee organisations that represent only officials in the public service.

520. In 1990 the State President committed himself to introducing adequate and suitable labour legislation for the public service through a process of negotiation with all interested parties. In the Laboria Minute[1] the Government committed itself to address the position of state employees as a matter of priority. In November 1990 the Commission for Administration called a meeting with 11 employee organisations which led to the setting up of a negotiation forum on the envisaged legislation.

521. So far, agreement had, according to the witness, been reached on the following principles:

- protection from unfair labour practices;

- the adjudication of unfair labour practice disputes by the Industrial Court;

- the establishment of a formal negotiation structure for bargaining at central level;

- protection of basic organisational rights for employee organisations;

- compliance with the principles of freedom of association, broadly understood;

- the basis for the proposed legislation is to be the Labour Relations Act;
- the legislation should be passed by Parliament in 1992.

522. The State as employer had however refused to agree to the following aspects of the proposed legislation, considered by the employees to be crucial:

- that all Public Service Act personnel be included in the legislation;
- that collective bargaining be conducted at department level;
- that all matters of mutual interest should be negotiable. The State was not prepared to negotiate over terms and conditions of employment other than dispensation issues (i.e. salaries and service dispensations such as leave, bonuses and allowances);
- that a definition of essential services be adopted which complied with international standards;
- that adequate dispute resolution mechanisms be enacted. The State steadfastly refused to allow arbitration for essential services or protection for striking workers.

(b) Territories excluded from the Act

(i) Status of the territories

523. The implementation of the policy of apartheid led to the creation of four "national states" and six "self-governing" territories, to which legislative competence in labour matters has been transferred.

524. The four "national states" are Trankei, Bophuthatswana, Venda and the Ciskei (known as the TBVC states) and under South African law they are regarded as independent, sovereign states. However, this status has not been recognised by any other State or international organisation. According to expert evidence given to the Commission, both the United Nations and other States continue to hold South Africa responsible in international law for the acts of the TBVC states.

525. The six "self-governing" territories are Gazankulu, KwaZulu, Kangwane, Kwa Ndebele, Lebowa and QwaQwa.

526. These ten territories are referred to collectively in this chapter as "the homelands".

(ii) Labour legislation of the territories

527. While the Commission was not in a position to examine the labour legislation of the homelands in any detail, on the basis of the material placed before it the present state of affairs may be summarised as follows.

528. In the Ciskei, Transkei, Venda, Kwa Ndebele, KwaZulu and QwaQwa the labour relations legislation closely follows the South African Labour Relations Act, in the last two territories in its pre-1988 form. Thus in general terms the problems identified in relation to the LRA are relevant to these territories also.

529. In Gazankulu, Lebowa and Kangwane, which have not adopted their own legislation on the subject, the South African legislation remains in force as it applied on the date they became self-governing. This means that in Gazankulu and Lebowa the Industrial Conciliation Act of 1956 remains in force as it was prior to the post-Wiehahn amendments, i.e. it applies only to "White" and "Coloured" workers. For Black workers, the Black Labour (Settlement of Disputes) Act, 1953, remains in force, although long since repealed in South Africa. In Kangwane the situation is even more paradoxical because the Labour Relations Act, 1956, remains in force as it was on 2 August 1984 but, by virtue of a Proclamation issued prior to that date, it applies only to White and Coloured workers and not to Blacks.

530. The situation in Bophuthatswana, on which more detailed information was made available, is more complex. The allegations made against it by COSATU may be summarised as follows. COSATU referred to two Acts, the Industrial Conciliation Act, 1984 (ICA), which is at present in force and the Industrial Relations Act, 1991 (IRA), which has been enacted but not yet brought into force.

531. The present Act, the ICA, excludes state employees, farmworkers and domestic workers from its scope and no other legislation guarantees them trade union or collective bargaining rights. The IRA will cover the latter two categories but state employees remain excluded.

532. Provisions governing the structure, membership and registration of trade unions impose serious restrictions on the right of organisations to draw up their constitutions and rules and to elect their representatives in full freedom, as well as to organise their administration and activities and to formulate their programmes. Moreover, the provisions governing registration, and limitations on the activities of unregistered unions, are such as to constitute a requirement of prior authorisation.

533. One of the most contested provisions, which figures in both Acts, is the requirement that a trade union, in order to function in Bophuthatswana, must have its head office in the territory and that only persons ordinarily employed and working in Bophuthatswana may be employed or hold office in a trade union. The effect is to render unlawful the activities of South African unions operating in Bophuthatswana. These restrictive measures will be strengthened once the IRA comes into force. It limits registration to "independent" trade unions and provides that a union will not be considered "independent" if it is under the control of a non-Bophuthatswana trade union, federation or political party.

534. The provisions governing strikes, according to COSATU, effectively precluded the possibility of lawful strike action even when it was not prohibited. This was, in the first place, because of the labyrinthine nature of the pre-strike procedure; secondly, because the State President of Bophuthatswana could, if he deemed it in the public interest, declare binding the decision of the industrial tribunal, which was the final stage in the pre-strike procedure; and, thirdly, because there was no forum in which employees who were dismissed following lawful strike action could challenge the fairness of that dismissal.

535. In addition, the IRA introduced prohibitions on strike action which went beyond what was legitimate under ILO standards. Thus strikes over disputes arising out of enterprise-level bargaining and disputes of right were prohibited. The definition of essential services was unduly wide. Further, under the IRA the judicial committee could, on application, prohibit strikes which were in conflict with the "national interest".

536. The ICA contained no provisions protecting employees against anti-union discrimination; some protection in this field was provided for by the IRA, which introduces an unfair labour practice system.

537. The Bophuthatswana Labour Act placed restrictions on the freedom of employers and trade unions to agree on stop-order arrangements. The Act made such deductions from an employees's wages without the consent of the Director of Labour a criminal offence unless it was authorised by any law or a court order. Such deductions were not authorised by the ICA but were authorised by the IRA, except for dues in respect of a trade union which had its head office in South Africa, whose deduction was ordinarily prohibited.

538. According to COSATU, the industrial relations machinery provided for in the ICA had never really functioned. Only three localised trade unions and two industrial councils had been registered. The dispute machinery, consisting of conciliation boards and an industrial tribunal, had never been invoked. Instead, recourse was had to industrial boards. These were described by the Government of Bophuthatswana as a "half-way stage to free negotiation". Thirty-two such boards had been formed for the various industries. These boards had drawn up regulations under which in-house works committees operated.

539. COSATU further contended that the powers conferred on the Bophuthatswana authorities under the Security Clearance Act, 1985, and the Internal Security Act, 1979, could be used to restrict or prohibit the legitimate activities of trade unions and the exercise by workers of their right to form and join the trade union of their choice and take part in its activities. It added that under a state of emergency declared on 10 March 1990 numerous political activists and trade unionists were arrested and detained during the period from October 1990 to November 1991. According to COSATU, allegations of torture of persons arrested or detained were widespread.

(iii) Policy and practice in relation to the territories

540. According to COSATU, the Southern African State had, over the years, pursued a vigorous programme of industrial decentralisation to the homelands and adjacent areas, dividing the country into development regions and establishing deconcentration and industrial development points, involving the investment of billions of rands in order to attract local and foreign investors to locate or relocate to the homelands.

541. The development of border industrial areas and those areas in the homelands adjacent to the major urban areas had meant that a significant portion of the workforce of a number of homelands crossed the border daily to work. The absence of adequate employment opportunities in all homelands meant that, in addition, the bulk of the economically active population were employed in South Africa outside of the homelands, returning to their homes only during leave and times of unemployment.

542. For example, in Bophuthatswana, the economically active adult population was comprised as follows: 190,268 workers were employed locally, 116,009 workers commuted to their workplaces in South Africa daily and 246,448 workers were migrant labourers, residing temporarily in South Africa.[2]

543. COSATU further contended that democratic trade unions had received particular attention from the homelands governments, as they were perceived to constitute a threat to the political power wielded by their leaders and to the

low wages and poor working conditions which had historically attracted industrial investment to the homelands.

544. To illustrate the problems confronting both trade unions and employers as a result of the differences in legislation between the homelands and the rest of South Africa, and of the restrictions placed on their activities in the homelands, COSATU provided the following information.

545. Bophuthatswana's most important mineral deposits were platinum. These were mined by two major mining complexes: Impala Platinum Mines and Rustenburg Platinum Mines. Impala Platinum Mines (Implats) mined exclusively in Bophuthatswana and employed approximately 43,000 workers on its operations. Its holding company was Genmin (General Mines), one of the six mining houses that dominate the South African mining industry. Rustenburg Platinum (Rusplats), on the other hand, was located in both Bophuthatswana and South Africa, with a workforce of some 30,000. Its holding company was Johannesburg Consolidated Investments, also one of South Africa's six mining houses. The history and patterns of trade union organisation at these two massive mining complexes revealed the destructive impact of Bophuthatswana labour legislation on freedom of association and the development of orderly collective bargaining.

546. In 1986, 25,000 employees were dismissed for striking at Implats. The strike was caused by a range of factors all integrally linked to freedom of association. These related to the right of employees to organise themselves into trade unions of their own choice; the victimisation and dismissal of employees who had joined the National Union of Mineworkers (NUM - a South African union and an affiliate of COSATU); and the inability of employees to play any role in determining their conditions of employment. A central demand of employees at Implats had been for the recognition of the NUM as their collective bargaining agent. The mine management had consistently refused to recognise the union. It gave as its reason that Bophuthatswana legislation prohibited it from doing so. NUM had a signed-up membership of more than 27,000 workers at Implats. This membership had been verified by the management. In contrast, the Bophuthatswana National Union of Mine Employees (BONUME), which was registered for the mining industry in accordance with Bophuthatswana legislation, had little worker support. Approximately 3,000 workers at Implats were members of BONUME.

547. The year 1991 saw the recurrence of widespread strike action at Implats. Again, the cause of the strikes lay in the statutory prohibition on the mine being able to recognise the NUM as the collective bargaining representative of its employees. At times, the entire workforce of more than 40,000 had been involved in strikes. The most recent strikes at Implats occurred in November 1991. Between 35,000 and 40,000 employees participated in these strikes. Again, the cause of the strikes was a set of factors, all of which impacted upon collective bargaining. These were: the demand for the employees' chosen collective bargaining representative, the NUM, to be recognised by management; the demand that the dismissal of some 400 workers dismissed for involvement in an underground sit-in be referred to independent arbitration as the Bophuthatswana legislation did not provide the means for dismissed employees to challenge the fairness of their dismissal; a protest against the extensive and continued harassment, detention and torture of NUM members by officials of Bophuthatswana security forces. Workers returned to work at Implats without management accepting the demands for trade union recognition or for the disputed dismissals to be referred to arbitration. The possibility of the union and the mine reaching some arrangement to establish agreed collective bargaining and dispute resolution structures at the mine was being hampered by the uncertainty as to the state of labour legislation in Bophuthatswana (as indicated above the IRA has been adopted to replace the ICA

but has not yet been brought into force). The mine's management had been adamant in its refusal to refer the dispute concerning the dismissals to arbitration.

548. During the strike the Bophuthatswana security forces engaged in widespread assaults and detention of mineworkers. On 14 November 1991, the Central Workers' Committee of Impala Platinum obtained a Supreme Court Order demanding the immediate release from detention of 17 of its members. Several of these detainees had made allegations of assault and torture of detainees at the hands of the Bophuthatswana security forces.

549. SACCOLA, in its written submissions, enclosed the comments of Implats on the situation of NUM and the company's Bophuthatswana operations in 1991. The company denied that it had victimised union members. It described a November 1990 meeting between the NUM General Secretary and the managing director of the company at which the latter explained that the company endorsed freedom of association as a fundamental principle and was uncomfortable with not being able to deal freely with the union apparently favoured by its employees. He suggested that, given the legislative obstacles, the union legalise its position in Bophuthatswana. More than 12 months later NUM instituted the registration process, but in the meantime a wage dispute had broken out involving six months of intermittent industrial action. Implats and NUM reached agreement on the main clauses of a recognition agreement in September 1991. According to Implats, however, industrial action continued. It took no disciplinary action until mid-October when it dismissed 200 employees following a sit-in during which many employees had been held hostage underground. There was also violence in the form of 21 employees killed during clashes between groups of employees, arson, abduction and one case of murder. Implats concluded that it had erred on the side of tolerance since stricter disciplinary action at an earlier stage might "have been less disruptive to all parties".

550. Implats managers played a leading role in making representations to the Bophuthatswana Government on the new Industrial Relations Act.

551. According to COSATU, as the Rustenburg Platinum operations extended beyond the South African border into Bophuthatswana, Bophuthatswana labour law created an additional set of difficulties. Rusplats recognised NUM as representative of workers employed on the South African side of the border, but refused to recognise it in respect of those workers employed in Bophuthatswana. This meant that employees on the South African side were able to participate in the determination of the terms of employment through collective bargaining, whereas those in Bophuthatswana were unable to do so. The mine management refused to disclose to NUM the terms on which employees in the Bophuthatswana side of the mine were employed. There were no structures for the resolution of collective disputes or for collective bargaining in Bophuthatswana and management had endeavoured to foist unrepresentative committee structures on employees there. Active union members employed on the South African side were transferred to Bophuthatswana, thus frustrating trade union organisation on the South African side.

552. SACCOLA, in its written submissions, enclosed the comments of Rusplats on this allegation. The company stated that it was correct that it recognised NUM as the collective bargaining agent for its members employed in certain job categories in which the union had a proven degree of representation in respect of mines and works situation in South Africa. The law of Bophuthatswana precluded employers from recognising any union which was not registered in terms of the ICA. Accordingly it did not "refuse" to recognise NUM as representing that union's members in Bophuthatswana, but was

precluded by law from doing so until such time as NUM complied with the provisions of the Act. It understood that NUM was in the process of doing so.

553. According to Rusplats, it was incorrect to state that the company had refused to disclose the terms on which employees on the Bophuthatswana side of the border were employed. Management had on a number of occasions indicated to the union that the same conditions of employment applied to employees on both sides of the border in order to maintain consistency. There was a tacit understanding that any agreements reached with the union pertaining to wages and conditions of employment in respect of members employed on the South African side of the border would be rolled over to employees on the Bophuthatswana side of the border.

554. By virture of the nature of its operations, Rusplats was obliged to transfer employees from time to time from one section to another, which could entail cross-border transfers. It had a procedure whereby an employee could object to his transfer, the reasons therefor then being discussed with him and if necessary his union representative. Whilst every attempt was made to accommodate the employee's request, the exigencies of Rusplats' operations could require a cross-border transfer. It emphatically denied that it deliberately sought to transfer active union members to Bophuthatswana to frustrate trade union organisation on the South African side of the border, if that is the tenor of COSATU's submission.

555. A witness gave further information concerning the problems facing workers and trade unions in these mining complexes. According to him, the vast majority of their employees saw themselves as part of the workforce in the South African mining industry and wished to be members of the NUM, first because many of them had previously worked in mines elsewhere in South Africa and secondly because the mines were controlled by the large South African mining houses and a local union would have little power against these massive institutions, which were for all practical purposes a part of the South African mining industry. However, since only trade unions registered in Bophuthatswana (which the NUM could not do since its head office was in South Africa) could make use of the Bophuthatswana industrial relations machinery, there was no way in which members of the NUM could resort to dispute resolution procedures or legal strike action.

556. The witness referred to extensive talks held in late 1991 between the NUM and the head office management of Implats in Johannesburg which resulted in a commitment in principle to recognise the NUM as the collective bargaining representative of its 27,000 members at Implats. However, the implementation of this commitment was impossible because of the restrictions in the Bophuthatswana legislation. Moreover, the local mine management and Bophuthatswana security forces had, according to the witness, colluded in a campaign of widespread harassment of the local union leadership, involving detention and torture. For example, 18 union committee members were detained in November 1991. They were released after an urgent application was brought on their behalf, but on their return to the mine they were dismissed for absence from work. Where employees were dismissed they had no recourse to any forum where they could challenge the fairness of their dismissal.

557. In addition, a witness from NACTU provided evidence on the jurisdictional problems created by the existence of the ten homelands for unions trying to pursue a dispute in areas where an employer conducted his business in both a homeland and South Africa; he referred to two judicial decisions illustrating the difficulties encountered by unions in this regard.

558. In the first case,[3] the appellants were employed by a bus company incorporated in the Ciskei (though formerly in South Africa) which operated

buses in the Ciskei and South Africa. The two appellants had been transferred from a depot in South Africa to one in the Ciskei where they were working when they were dismissed. The disciplinary inquiry leading to their dismissal was held in South Africa. One of them lived in the Ciskei, the other in South Africa. They applied in South Africa for the establishment of a conciliation board under section 35 of the LRA, and appealed against the refusal of their application. The court held that the South African authority had no jurisdiction to establish a conciliation board even though the disciplinary hearing and dismissals took place in South Africa. The dispute concerned matters which had taken place in the Ciskei and their dismissal from employment in the Ciskei. Moreover, as regards the appellant resident in the Ciskei, the court had no jurisdiction because of lack of residence in South Africa. There was a similar result in the second case.[4]

559. A weapon used by the Bophuthatswana Government in its efforts to prevent workers in the territory from joining the union of their choice when this is a South African union was its power to deport people under the provisions of the Aliens and Travellers Control Act. Thus deportation orders had been served on various members of management of companies that had agreed to recognise South African unions in Bophuthatswana. Companies affected by such orders included major South African corporations AECI, Pick 'n Pay, Premier Milling and the international motor manufacturer, BMW.

560. The Government did not comment on this information. It adhered to the South African position that Bophuthatswana was an independent State. However, at the request of the Commission, the South African Ministry of Foreign Affairs transmitted to the Bophuthatswana authorities an invitation to send a representative to testify before the Commission. No response was received to this invitation.

561. The Government's position in relation to the homelands as a whole was that, as the TBVC states were independent, it could not impose any changes on them. It is, however, going through a process of consultation with the governments of the "self-governing" territories seeking to achieve the harmonisation of the legislation governing labour relations.

562. It may be noted that the future of the TBVC states is under examination in CODESA, where it is being considered by Working Group 4. The terms of reference of this Working Group are reproduced in Annex VII.

563. The conclusions of the Commission on the matters dealt with in this chapter are contained in paragraphs 723 to 745 below.

Notes

[1] See Annex II.

[2] 1987 Statistical Abstracts, Institute for Development Research of the Development Bank of South Africa.

[3] Lamani v. CTC Bus Company (1988) 9 ILJ 583 (ECP).

[4] Transport and Allied Workers' Union and others v. Bahwaduba Bus Service (Pty) Ltd (1991) 12 ILJ 1367 (IC).

PART V: Conclusions and recommendations

CHAPTER 13

CONCLUSIONS

(a) Introduction

564. The complaint leading to the establishment of the Commission was submitted in May 1988. At that time, the African National Congress (ANC) and other political parties were banned and their leaders in detention or in exile, a state of emergency was in force and COSATU was subject to restrictions under the Government Notice quoted in paragraph 275. The trade union movement was suffering from the effects of the repressive measures taken against it under the Internal Security Act and the Public Safety Act, and from the tense atmosphere which prevailed following the mineworkers' strike of 1987. In this context the Labour Relations (Amendment) Bill, which was the subject of the complaint, and was subsequently enacted with only minor changes, was perceived as designed to halt and even roll back the progress made by the trade unions since the Labour Relations Act (LRA) had been extended to Black workers in 1981. It was perceived as having been inspired by employer interests and promoted by a reactionary Department of Manpower.

565. At the time the Commission visited South Africa, however, profound changes were under way. The visit took place just two years after the announcement by the State President, Mr. F.W. de Klerk, at the opening of Parliament on 2 February 1990 that the ban on certain political parties would be lifted, political prisoners released and a process designed to lead to the adoption of a democratic Constitution vigorously pursued.

566. It was no doubt in large part as a result of this new climate that COSATU, NACTU and SACCOLA were able to conduct successful negotiations concerning amendments to the Labour Relations (Amendment) Act, 1988 and that the results of these negotiations were in large part accepted by the Government and enacted in February 1991.

567. The 1991 Act, which addressed the specific issues raised in the 1988 complaint, significantly reduced the scope of the investigations called for under the Commission's original mandate. It was in these circumstances that the then Minister of Manpower indicated to the Director-General of the ILO, at a meeting with him in Geneva in September 1991, that the Government would consent to an enlarging of the mandate to cover labour matters in general. After protracted negotiations between the parties, agreement was finally reached on the eve of the Commission's visit, on a revised mandate under which the Commission was "to deliberate on and consider the present situation in South Africa insofar as it relates to labour matters with particular emphasis on freedom of association". In the circumstances, it appeared appropriate to the Commission to proceed on the basis of the revised mandate agreed by the parties.

568. In the meantime, COSATU had, on 3 December 1991, communicated further detailed submissions raising all the issues which in its view should be examined under an extended mandate. These were taken as the basis of the arguments and evidence at the hearings.

569. The arguments and evidence of COSATU covered essentially two issues. First, points on which the present industrial relations system, and

in particular the LRA, was said to be incompatible with the principles of freedom of association; and secondly, specific acts and measures taken or susceptible of being taken against trade unions and their members, for example under security legislation.

570. Concerning the first of these issues, the Commission conceives its role to be that of assessing South African industrial relations law and practice by reference to the principles of freedom of association as developed by the ILO supervisory and fact-finding bodies. The Government of South Africa, in its letter of 19 February 1991 consenting to the referral of the complaint to the Commission, fully associated itself with the aims of the Convention concerning freedom of association.

571. The Government expressed reservations about the possibility that the Commission would make detailed recommendations concerning the measures to be taken and the amendments to be made to the legislation, which it considered might have a negative impact on the ongoing process of seeking an agreement between the parties concerned on the measures being prepared to revise the labour relations system. The Commission does not consider this to be part of its function. It is for the Commission to identify the respects in which South African law and practice fail to comply with the principles of freedom of association. It is then for the authorities in South Africa, in consultation with all the parties concerned, to determine the details of the measures to be taken to eliminate the discrepancies.

572. Concerning the second issue, the Government contended that repressive measures against trade unions and their members had stopped since 2 February 1990. To a large extent this claim is borne out by the evidence before the Commission. COSATU, however, pointed to certain incidents since that date. It argued that, as long as the legislation remained in force, it could be brought back into use. It therefore remained relevant. To this the Government replied that, not only was it no longer being used, it had in practice been superseded by the Convention for a Democratic South Africa (CODESA) where it was under review, and it would certainly not survive in its present form.

573. The Commission considers that it is not its function to place the Government on trial or to pass judgement on it in respect of past incidents. So much was conceded from the outset by COSATU. The revised terms of reference refer to "the present situation". However, the legislation still remains in force. It provides a chilling effect on the development of sound industrial relations. The Commission considers it to be part of its role to take account of past practice and incidents as illustrating how the legislation has been used in the past and could still be used again as long as it remains unchanged. The Commission should identify uses of the legislation which are incompatible with the principles of freedom of association. It is not its purpose to make specific findings or pronounce specific condemnations about the various incidents alluded to in the written submissions or evidence. It is sufficient for the Commission's purpose to record the evidence as illustrating the milieu in which industrial relations have, until now, been practised in South Africa.

(b) General considerations

574. The Government emphasised, in the course of the proceedings, that it was presently engaged in the drafting of important legislation which related to trade unions, industrial relations as such and freedom of association as it

affected industrial relations, and that it intended to consult with those who represented the major actors in the labour relations arena, to obtain their comments and to ensure, insofar as possible, that the legislation enjoyed the confidence of all the parties concerned. It further indicated its acceptance of the principle that labour relations and conditions could best be worked out through broad consensus between the representatives of employers and workers, with the State involved in the tripartite relationship having regard to general public policy and so as to give statutory effect to any recommendations which were accepted.

575. This approach found concrete expression in the enactment of the Labour Relations (Amendment) Act, 1991, following the COSATU/NACTU/SACCOLA (CNS) Accord. It is the Government's declared intention to pursue the same approach through a restructured National Manpower Commission (NMC).

576. The Commission considers that the Government should pursue vigorously the steps being taken to reactivate the NMC, with a tripartite structure that is acceptable to all the parties concerned. It sees force in the argument that the Government, through the Department of Manpower, should be actively involved in the deliberations of the NMC. In this way its views may be taken into account and considered in determining the NMC's recommendations. This does not necessarily imply that the Department should be a full voting member of the NMC. It retains its function of advising the Minister in the last resort. However, it would mean that the other members of the NMC could make their recommendations in the light of the positions taken by the Department in the course of the deliberations. It would also mean that the Department would be made aware of the perspectives of the other parties to the NMC. The reports of the NMC should be made public and given wide circulation.

577. The Commission considers it important, if an effective NMC is to be reconstituted and resume its work, that COSATU and other trade union federations should resume active participation in discussions aimed at achieving this objective as soon as possible.

578. Apart from the specific issues dealt with in the following sections of these conclusions, one of the fundamental problems with the LRA in its present form, on which there was agreement between the parties, is the lack of coherence in its structure and its complexity. These problems have followed the large number of often radical amendments which have been made to it in the 25 years following its original adoption. The result is that it is extremely difficult to understand. The Government recognised that the LRA is inadequate for South Africa's needs and must be amended. The Commission was informed that a technical committee of the NMC had already prepared a draft of a consolidated LRA which awaits consideration by the NMC once restructured. As well as addressing the substantive issues concerning freedom of association identified by the Commission, it is important that the new Act should aim at simplicity and clarity so that it can be readily understood and used by the authorities charged with administering it, as well as by employers, trade unions and their members.

579. In framing its conclusions and recommendations, the Commission has endeavoured, in keeping with its function of conciliation, to furnish a basis on which the parties may progressively resolve by agreement the problems which remain outstanding. It is encouraging to note that on many issues there already appeared to be a large measure of agreement.

(c) The right to form and join trade unions

(i) Constitutions of trade unions

580. The Commission has examined the provisions of the LRA on this subject in the light of the following principles as expressed by the Committee of Experts on the Application of Conventions and Recommendations:

> ... it is quite unusual to find in trade union law certain prescriptions governing this matter, which may be fairly detailed on certain points, such as conditions of eligibility for trade union office, the election of officers, the management of funds, etc. In many countries, such provisions aim primarily to protect the rights of members, to provide for a sound administration and to prevent legal complications from arising at a later date as a result of constitutions being drawn up in insufficient detail; in other words, they do not restrict the right of organisations to draw up their constitutions and rules in freedom.
>
> The question arises, however, as to whether it is always necessary for legislation to contain extremely detailed provisions on this subject. In practice, such provisions may impede the establishment and development of organisations. Legislation according to which union rules must comply with statutory requirements does not constitute an infringement of the principles of freedom of association provided that such requirements are purely formal and that approval of the rules is not within the discretionary power of the public authorities.[1]

581. Section 8(1) of the LRA contains a list of topics on which the constitution of a registered trade union or employers' organisation must contain provisions. Though long and somewhat elaborate, this list is not such as to restrict the right of organisations to draw up their constitutions and rules in full freedom.

582. However, certain other provisions of the LRA relating to the contents of constitutions do cause problems in this regard. First, section 8(4)(a)(iv) is too widely expressed. It envisages that a trade union constitution may provide for "any other matter which in the opinion of the Registrar is suitable to be dealt with in the constitution of a trade union or employers' organisation, as the case may be". It thus gives the Registrar an unfettered discretion to allow or disallow a particular provision in a trade union constitution.

583. Secondly, under section 4(5)(a)(ii) and (iii) of the LRA, the Registrar may not register a trade union until he is satisfied that:

> (ii) the constitution of the applicant union ... does not contain provisions which are contrary to the provisions of any law or are calculated to hinder the attainment of the objects of any law or are unreasonable in relation to the members of the public; and
>
> (iii) the union has not been formed for the purpose of evading the provisions of any law or is not affiliated to any politicial party ...

Leaving aside for the moment the question of political affiliation which is dealt with later,[2] the generality of this wording leaves open the risk of administrative interference in the contents of a trade union's constitution.

(ii) Registration of trade unions

584. Registration is not compulsory under the LRA. An unregistered union, provided it complies with certain requirements, is able to carry on a wide range of trade union activities. It must provide the Registrar with a copy of its constitution, its head office address and the names of its office-bearers and officials. It must maintain a register of members and audited accounts. It does not, however, enjoy certain important benefits which are conferred on registered trade unions. In particular, it does not acquire legal personality, it cannot become a party to an industrial council, its members, office-bearers and officials are not protected against civil liability for legal strike action, and it can enter into stop-order agreements with employers only if the Minister has given his approval.

585. Conferring specific benefits or advantages on registered trade unions is not necessarily incompatible with the right of workers to form the union of their choice as long as the requirements for registration are themselves compatible with the principles of freedom of association and as long as unions which comply with them have a right in law to be registered. However, as was pointed out by the Committee of Experts on the Application of Conventions and Recommendations:[3]

> Where, under a system of optional registration an organisation has to register in order to secure certain fundamental rights so as to be able to defend and further the interests of its members, the mere fact of the relevant authority having discretionary power to refuse registration would create a situation akin to that in which previous authorisation is required.

586. Under the LRA, a trade union is registered in respect of specific interests and for a specific area. It will be so registered if the Registrar is satisfied that it is "sufficiently representative" of those interests in that area. However, if an existing registered union lodges an objection and the Registrar is satisfied that that union is sufficiently representative of the interests and in the area applied for, he may, under the so-called "knockout" provision, refuse to register the applicant union.

587. This system, which may deny the advantages of registration to a trade union until it can satisfy the Registrar that it is "sufficiently representative", may have the effect of inhibiting workers from joining the trade union of their choice.[4]

588. In its concluding arguments, the Government conceded that "it seems common cause between all parties that the present system of registration is too cumbersome and outmoded". The Commission agrees. The Government suggested that the way forward should be for the parties to arrive at consensus as to a simple and efficacious manner in which trade unions can be registered and controlled so as not to impinge upon the rights of freedom of association. The Commission endorses this suggestion. One solution would be a simple registration system. Another would be a system of certification whereby the administrative authority would merely verify the fulfilment of certain formalities and judicial appeal would remain available as a protection against abuse.

589. By virtue of section 2(3)(b) of the LRA, a trade union whose membership is composed both of persons employed by the State and of private sector employees may not be registered.

590. This legislation cannot be considered incompatible with ILO principles, according to which:

> it is permissible for first-level organisations of public servants to be limited to that category of workers, on condition, however, that ... the first level organisations, like those of workers in the private sector, may freely join the federations and confederations of their own choosing.[5]

It does not seem, from the terms of the LRA, that there is any restriction on organisations of public employees freely joining a trade union federation or confederation.

591. Section 2(3)(b) of the LRA was amended in 1991 to permit the registration of unions with mixed membership. However, at the time the Commission held its Second Session in South Africa, this amendment had not been brought into force. It would be desirable for this to be done, particularly in the light of the evidence concerning the impact of the Government's policy of detaching certain services from the public service. This policy has had the result that the staff of such services are transferred to the private sector and thus come under the LRA. Because mixed unions cannot be registered under the LRA, these employees are not able to remain members of the union of their choice. According to the evidence before the Commission, some at least wish to remain members of the Public Service Association of South Africa. However, that union is unable to represent them effectively because it cannot be registered under the LRA if they remain members after transferring to the private sector.

(iii) Racially exclusive trade unions

592. One aspect of the practice concerning the registration of trade unions which the Commission viewed with serious concern was that relating to the registration of unions whose constitution limits membership to a single racial group, and whose registration limits the interests in respect of which they are registered to workers of that racial group.

593. The evidence given by the Registrar confirms that he continues to receive applications from unions for registration in respect of the interests of only one racial group. In the absence of objections, he registers such unions in accordance with their application.

594. Moreover, the constitution of a registered trade union may limit its membership to persons of a specified racial group or groups even if the limited racial composition is not reflected in the interests which the union is registered to represent.

595. A system which allows trade unions to define the qualifications for membership by reference to race, and confers on such trade unions the advantages deriving from registration, is not compatible with the fundamental principles of the ILO. This was affirmed as long ago as 1952 by the International Labour Conference in a resolution concerning the independence of the trade union movement in the following terms:

> A condition for [the] freedom and independence [of the trade union movement] is that trade unions be constituted as to membership without regard to race, national origin or political affiliation and pursue their trade union objectives on the basis of the solidarity and economic and social interests of all workers.[6]

596. It is essential that the proposed revision of the system for the registration of trade unions should ensure not only that unions can no longer be registered in respect of interests defined by reference to race, but that unions should be prohibited by law from limiting their membership to persons of a specified race.

597. The Commission also considered the question of whether registered trade unions whose constitution provides for a racially exclusive membership should have their registration cancelled. None of the witnesses questioned on this, including the representative of COSATU, favoured such a course. They expressed the view that this was a delicate issue which was best left to evolution and that the process of change now set in train would lead to a situation where they would phase themselves out or open up their membership under the pressure of developments.

598. The Commission considers that the goal should be to achieve as rapidly as possible a situation where no trade union or employers' organisation limits its membership by reference to race. There should be a transitional period during which a special officer should be appointed with the statutory duty to facilitate, within a given time, the removal of all provisions whereby membership of unions or employers' organisations, or the holding of office in them, is confined to persons of a particular race.

(iv) Deregistration and dissolution of unions

599. The provisions of section 13 (on the winding up of unions and employers' organisations) and section 14 (cancellation of registration of unions or employers' organisations) of the LRA do not infringe the principles of freedom of association. This conclusion is subject to the comments made by the Commision below (see paragraphs 605 and 606) on the wide powers given to the Registrar under section 12.

(d) The right of trade unions to function freely

(i) Executive powers of interference in elections and internal affairs

600. Section 12(3) of the LRA gives the Registrar wide-ranging powers to conduct an inquiry into the internal affairs of a registered trade union if he has reason to believe that any material irregularity has occurred in connection with an election, or that the union or any of its officers or organs has failed to observe the constitution or "has acted unlawfully or has acted in a manner which is unreasonable in relation to the members and which has caused serious dissatisfaction amongst a substantial number of members in good standing". In the course of his inquiry the Registrar may subpoena witnesses, enter premises to make an inspection and retain books and documents for examination. If, following his inquiry, the Registrar is satisfied that any of the above irregularities has occurred, he may recommend to the Minister what action he considers should be taken, including the holding of new elections. After giving the union concerned an opportunity to make representations, the Minister may order the holding of new elections and any other action recommended by the Registrar. There is no right of appeal against his decision, although it may be challenged by way of judicial review.

601. The Commission has considered these provisions in the light of the principles formulated by the Committee of Experts on the Application of Conventions and Recommendations in the following terms:

> The Committee considers that, although the application of legislative provisions and union rules concerning an organisation's administration must by and large be left to the members of the trade union, the principles set out in the Convention do not exclude external control of the internal acts of an organisation where they are alleged or where there are major reasons for believing them to be against the law (which should not of course infringe the principles of freedom of association) or the union's constitution.
>
> ...
>
> If on the other hand the administrative authority has discretionary power to examine the books and other documents of an organisation, conduct an investigation and demand information at any given time, there is a grave danger of interference which may be of such a nature as to restrict the guarantees provided for in Convention No. 87. Investigatory measures should be restricted to exceptional cases, when they are justified by special circumstances such as presumed irregularities that are apparent from annual financial statements or complaints reported by members of the trade union. Furthermore, in order to guarantee the impartiality and objectivity of the procedure, these controls should be conducted subject to review by the competent judicial authority. Legislation which empowers the administrative authorities to investigate the internal affairs of a union at their entire discretion does not conform to the principles of the Convention.[7]

602. If respect for these principles is to be guaranteed, the provisions of section 12(3) should define more narrowly the grounds on which the Registrar may conduct an inquiry with a view to preventing the possibility of abuse. It was not suggested in evidence that such abuse had occurred. However, the existence of such a very wide discretionary power always leaves such a possibility open.

603. A serious consequence of such an inquiry may be the removal of elected trade union officers or committee members through the ordering of fresh elections. The Commission does not consider that an adequate guarantee is provided in such cases by the fact that the decision of the Minister is subject to judicial review. Such review enables the courts to exercise only a limited control designed to ensure that the administrative powers were exercised lawfully and by proper procedures. It does not permit a re-examination of the merits of the exercise of the power.

604. The Commission applies the following views of the Committee of Experts:

> In the opinion of the Committee, the suspension or removal of trade union officers, in cases where violations of the legislation or of union rules have been proved in the course of judicial proceedings, as well as the appointment of temporary administrators, should be effected only through the courts. In addition, the law should fix criteria which are specific enough to enable the judicial authority to ascertain whether a trade union officer has committed such acts as would justify his suspension or dismissal. Legal provisions which are too general or provisions which do not respect the principles laid down in the Convention do not constitute an adequate guarantee in this respect. When administrative measures exist for the dismissal, disqualification or

suspension of trade union officers, taken in application of legal provisions, they should not become enforceable until the period allowed for the persons concerned to lodge an appeal to wholly independent judicial authorities has expired. Lastly, legislative measures taken by the public authorities governing the dismissal of trade union officers should only be aimed at protecting the rights of members, preventing abuses of authority on the part of leaders of the organisation and, if necessary, preventing complex legal problems from arising in the event of an internal dispute.[8]

605. Reference was also made by COSATU to section 12(1) of the LRA. Under this provision, where the Registrar has reason to believe that a union is unable to function because of a failure to observe the requirements of its constitution, he may issue instructions with a view to rectifying the position if, in his opinion, a substantial number of the members desires the union to continue to function. In doing so he is required to "prescribe a procedure which as nearly as practicable conforms to that prescribed in the constitution of the union".

606. The purpose of the provision - as was confirmed by the evidence of the Registrar - appears to be to enable him to initiate action to reactivate a union for the benefit of its members when it has become inactive. However, as presently worded, it leaves a very considerable degree of unfettered discretion to the Registrar. In order to prevent the possibility of undue interference, in breach of ILO principles, the provision should be reworded so as to provide that the Registrar may take such action only at the request of members of the union and not on his own initiative.

607. Finally, COSATU referred to the Internal Security Act which it said, in conjunction with section 78(2) of the LRA, empowered the Government to prevent persons of certain political persuasions from holding office in trade unions, and thus constituted an interference with the right of unions to elect their representatives freely. The relevant provisions of the Internal Security Act were repealed by the Internal Security and Intimidation Amendment Act, 1991.

(ii) Legislative regulation of financial affairs

608. Under the Fund Raising Act, 1978, the Affected Organisations Act, 1974, and the Disclosure of Foreign Funding Act, 1989, the public authorities can scrutinise and control the funding of organisations, including trade unions, by way of donations and from foreign sources.

609. The Committee of Experts on the Application of Conventions and Recommendations has expressed the view that supervision of union finances should not normally go beyond a requirement for the organisation to submit periodic financial returns,[9] and has also pointed out that restrictions on financial assistance from abroad may be prejudicial to the right of trade unions, protected by Article 5 of Convention No. 87, to affiliate with international organisations of workers.[10]

610. The Government did not contest that these Acts could be used to interfere with the financial independence of trade unions. However, it pointed out that they had not been implemented against any trade union since February 1990. Certainly no evidence was given of their successful use against a trade union since that time. Moreover, the Government expressed the conviction that the CODESA negotiations would lead to action to remedy any infringements of personal or group freedoms resulting from the foregoing legislation.

611. The Acts in question should be repealed or amended in such a way that they cannot be used so as to interfere with the right of trade unions to administer their financial affairs without undue interference from the public authorities.

612. Employers may not enter into stop-order arrangements with unregistered trade unions, without the approval of the Minister. The Commission considers that agreements for a stop-order facility are a matter which should be left to be negotiated freely between employers and trade unions, and that the requirement of ministerial approval constitutes an unwarranted interference in collective bargaining contrary to the provisions of Convention No. 98.[11] It therefore concludes that subsection (1C) of section 78 of the LRA should be repealed.

613. The Commission heard evidence of the difficulties facing trade unions in collecting union dues when they did not have a stop-order arrangement and the employer refused them access to the workplace for this purpose. In this connection, it wishes to draw attention to the ILO Recommendation concerning Protection and Facilities to be Afforded to Workers' Representatives in the Undertaking, 1971 (No. 143) which provides in Paragraph 14:

> In the absence of other arrangements for the collection of trade union dues, workers' representatives authorised to do so by the trade union should be permitted to collect such dues regularly on the premises of the undertaking.

(iii) Restrictions on political activities

614. Section 8(6)(c) and (d) and (8) of the LRA prohibit a trade union from affiliating with a political party and from providing funds or carrying on any other activities with the object of assisting a political party or any candidates for election to office in a political party or to a legislative body.

615. The Government conceded that these prohibitions were incompatible with ILO principles. This concession was correctly made. A general prohibition on all political activities is contrary to the provisions of Convention No. 87, under which workers' organisations must have the right to draw up their constitutions in full freedom and to formulate their programmes. The law of the land must not be such as to impair the guarantees provided for in the Convention.[12] The Government also recognised that the ILO principles should apply and that the relevant provisions of the LRA should be deleted.

616. Decisions taken in the political arena may have a profound impact on the social and economic conditions of workers. If trade unions are to defend the interests of their members, they should not be obliged to confine themselves solely to shop-floor questions. They must be free to express their views publicly on a government's economic and social policy, since their fundamental objective is to advance the social and economic well-being of their members.[13]

617. At the same time, this freedom to enter the political arena imposes a duty on trade unions not to overstep the line between what is of legitimate concern to trade unions in the broad sense and what is exclusively political in character. This necessity to respect the limits of legitimate trade union activity was given expression by the International Labour Conference in its

resolution on the independence of the trade union movement adopted at the 35th (1952) Session of the Conference in the following terms:

> When trade unions in accordance with national law and practice of their respective countries and at the decision of their members decide to establish relations with a political party or to undertake constitutional political action as a means towards the advancement of their economic and social objectives, such political relations or actions should not be of such a nature as to compromise the continuance of the trade union movement or its social and economic functions irrespective of political changes in the country.

618. The application of these principles in the present case has to be considered in the light of the very special context of South Africa. Until February 1990 the major Black political parties were prohibited. The Government properly conceded that it was natural, and indeed inevitable, that Black political aspirations should seek expression through the only lawful organisations open to them, namely the trade union movement. It argued, however, that now that the Black political parties were able to function freely and indeed, although not yet represented in the legislature, had in CODESA a forum in which they were able to present their demands, there was no longer any need or scope for trade unions to play a political role.

619. COSATU for its part conceded that ILO principles did not envisage that trade unions should be free to undertake purely political activities.

620. The Commission concludes that the principles laid down by the ILO in respect of activities appropriate to trade unions in pursuit of economic and social objectives are capable of application in South Africa and should be implemented. The blanket prohibitions in section 8(6)(c) and (d) and (8) should be repealed.

(iv) Impact of security and related legislation on trade union activities

621. It was contended by the Government that COSATU's arguments concerning security legislation consisted largely in alleging that certain provisions were so worded that they could be used to repress or inhibit trade union activities, rather than in demonstrating that they had been so used, at least since February 1990. The Government added that the whole range of legislation attacked was under review in CODESA - more particularly Working Party I[14] and would disappear from the statute book once a new constitution for South Africa is adopted arising out of the deliberations in CODESA.

622. The Commission has taken note of the Government's expressed intention to proceed to a new constitutional order in which those legislative provisions which infringe the rights and freedoms of the citizens of a democratic society and their organisations - including trade unions - will disappear.

623. However, for the time being, these provisions remain in force. The Commission must therefore examine their potential impact on the legitimate activities of trade unions.

624. As far as freedom of assembly is concerned, COSATU drew attention to section 46 of the Internal Security Act. Subsection 1 of this section empowers a magistrate, if he "has reason to apprehend that the public peace would be seriously endangered", to prohibit gatherings for a period not

exceeding 48 hours or to authorise them "in accordance with such conditions as he may determine".

625. This provision covers gatherings in general. In so far as the power to prohibit gatherings may only be exercised if there is reason to fear that the public peace would be endangered, the prohibition is limited to 48 hours and may be imposed only by a judicial officer, it does not seem that this provision can be considered to involve an infringement of trade union rights. At the same time, it should not be abused to prevent the holding of a trade union meeting unless there is a real danger to public peace.

626. The powers under section 46(3) of the Act are much more far-reaching. This provision empowers the Minister of Law and Order to prohibit gatherings, either generally or for specific purposes or in specific places or areas, for such periods as he may determine. Although there is no such prohibition now in force, there was from 1976 until March 1991 a nationwide prohibition on outdoor gatherings (except funerals and sporting events) and certain indoor gatherings (including those whose purpose was to call for an unlawful strike) without the authorisation of the Minister or a magistrate. This prohibition was used to prevent COSATU from holding May Day rallies in 1987, and to prevent another union from holding an open-air meeting for the purpose of convening its annual general meeting.

627. It is thus clear that a legal restriction on meetings in such general terms can be, as it has been, used to prevent trade unions from holding public meetings for trade union purposes.[15] If it is necessary to retain, in the interests of public peace and security, the possibility of introducing prohibitions on gatherings, the legislation or the notice imposing the prohibitions should not interfere with the right of trade unions to hold peaceful meetings for purposes which fall within the purview of their legitimate objectives. At the very least, exceptions such as those provided in the past for funerals and sporting events should be extended to cover trade union meetings. In addition, there should be speedy and effective judicial recourse to challenge any alleged abuse.

628. Turning to the question of freedom of expression, COSATU asserted first that the distribution of its publications had in the past been prohibited under the Publications Act, 1974, and secondly that, while the Emergency Regulations were in force, the security forces had on a number of occasions seized large quantities of its publications.

629. The Commission makes no comment on the system of control of publications under the Publications Act. This is of general application. It deals with matters beyond its mandate. However, it draws attention to the following statement by the Committee on Freedom of Association:

> The publication and distribution of news and information of general or special interest to trade unions and their members constitutes a legitimate trade union activity and the application of measures designed to control publication and means of information may involve serious interference by administrative authorities with such activity. In such cases the exercise of administrative authority should be subject to judicial review at the earliest possible moment.[16]

630. It is to be noted in this regard that the Publications Act does not provide for a judicial appeal.

631. COSATU also referred to other legislation which it considered imposed restrictions on the freedom of expression of trade unions, namely the Police Act, Prisons Act and Defence Act. It argued that the restrictions in

these Acts on the publication of information concerning the conduct or activities of the police, prison service and defence forces inhibited or restricted trade unions from publishing information on action taken against their members, premises and publications and exerting pressure for redress.

632. Particularly in the atmosphere of intimidation prevailing during the states of emergency, trade unions in South Africa were inhibited by this legislation from publishing information concerning action taken against them and their members by the police and defence forces and prison service. None the less, the Commission cannot disregard the fact that the legislation relating to the police and prisons punishes only the publication of untrue or false information. The burden of proof is placed by the legislation on the defendant not to prove that the information was true but that he had reasonable grounds to believe that it was true or took reasonable steps to verify it. The Commission does not consider that it need comment in detail on the provisions of this legislation. Nor need it comment on the provisions of the Defence Act which places limits on the publication of information concerning the South African Defence Force.

633. COSATU also contended that government control over broadcasting under the terms of the Radio Act and Broadcasting Act had been used to restrict the diffusion of information of importance to the trade union movement. The control of radio and broadcasting is again a matter which goes beyond questions specifically relating to trade union rights. The Commission does not need to pronounce on it. None the less, it notes that measures are currently being taken to restructure broadcasting in South Africa. These should lead to a system under which the views of the trade unions and employers' organisations on matters of legitimate interest to them may be given a fair airing.

634. Certain of the measures objected to by COSATU were taken under the Emergency Regulations in force at various periods between 1985 and 1990. These included, in particular, the power to impose restrictions on the activities of organisations which was used against COSATU itself, and the prohibition of "subversive statements" which included statements encouraging members of the public to take part in strikes which were unlawful under the LRA.

635. The Emergency Regulations themselves are no longer in force. However, the Public Safety Act under which a state of emergency can be declared remains in force. The Commission therefore draws attention to certain principles which should be observed so as to ensure that trade union rights are respected should the Government again find it necessary to declare a state of emergency and issue Emergency Regulations. These have been stated by the Committee on Freedom of Association in the following terms:

> Where a state of siege exists, it is desirable that the government, in its relations with occupational organisations and their representatives, should rely, as far as possible, on the ordinary law rather than on emergency measures which are liable, by their very nature, to involve certain restrictions on fundamental rights.
>
> Measures taken by the authorities in a state of emergency may constitute serious interference in trade union affairs, contrary to Article 3 of Convention No. 87, except where such measures are necessary because the organisations concerned have diverged from their trade union objectives and have defied the law. In any case, such measures should be subject to appropriate procedures for judicial review that may be invoked without delay.[17]

636. The Commission also wishes to comment on COSATU's argument that the definitions of the crimes of "sabotage" and "subversion" in section 54 of the Internal Security Act are so open-ended and ill-defined that they are easily capable of being applied to boycotts, stay-aways and strikes.

637. The evidence given before the Commission revealed that these provisions had never been used successfully against trade unionists for activities of this kind. At the same time it is true that their wording is such that, taken literally, they could be interpreted as making even a lawful strike or the call for such a strike a criminal offence. Legislation designed to prevent attempts to subvert the existing social order should be reformulated so that it cannot be used to infringe the basic guarantees of freedom of association or to sanction activities which, in accordance with the principles of freedom of association, should be considered as legitimate trade union activities.[18]

638. The Commission notes in this regard the Government's statement that this legislation is under review within the framework of CODESA, and that it is likely to disappear under the new constitutional order.

(e) The right to strike

(i) Procedural requirements

639. COSATU referred to the complex web of procedural requirements for a strike to be legal, and alleged that employers were quick to have recourse to the courts, claiming alleged procedural irregularities, in order to frustrate strikes. It called for the simplification of the law so as to ensure that strikes did not become illegal merely on technical grounds.

640. The Government argued that, despite the LRA's requirements, strikes were still possible in practice. It pointed out that, in fact, many legal strikes took place. It was of the opinion that the procedural formalities in the LRA were acceptable under ILO principles.

641. The Commission considered this issue in the light of the principle that, while fulfilment of some procedures may well be acceptable, they should not become so cumbersome as to render lawful strikes almost impossible in practice.[19] In particular, it has kept in mind the principle that:

> The conditions that have to be fulfilled under the law in order to render a strike lawful should be reasonable and in any event not such as to place a substantial limitation on the means of action open to trade union organisations.[20]

642. The Commission considers that both the complicated nature of the various pre-strike requirements and the length of time needed to fulfil them have had a negative effect on the exercise of the right to strike in South Africa. The procedural requirements set out in sections 27A, 35 and 65 (1)(d) and (2)(b) of the LRA should be amended so as to simplify the procedures in conformity with the principles on freedom of association.

643. On the particular question of strike ballots, namely whether an affirmative vote should require a majority of all the members of the union in the undertaking affected or simply of the workers who took part in the ballot, the Commission draws the Government's attention to the views of the ILO supervisory bodies on this point:

> The requirement that an absolute majority of workers should be obtained for the calling of a strike may be difficult to fulfil especially in the case of unions which group together a larger number of members. A provision requiring an absolute majority may, therefore, involve the risk of seriously limiting the right to strike.
>
> and
>
> A provision requiring the agreement of the absolute majority of the workers of the undertaking concerned for the calling of a strike may constitute a serious limitation on the activities of trade union organisations.[21]

644. The Commission considers that the Government should take steps to remove the inconsistency existing between these principles on freedom of association and section 65(2)(b) of the LRA.

(ii) Aims and exercise of the right to strike

645. COSATU submitted that the LRA's restrictions on strikes beyond shop-floor issues, in particular the ban on strikes over social and economic aspects of government policy and the courts' gloss on this to restrict strikes to issues capable of being met by employers, go too far and should be confined to purely political strikes.

646. The Government attempted to justify this prohibition by reference to the state of transition the country was going through and expressed the view that it is not conducive to good order nor in the public interest to allow strikes to be called over any issue. While recognising that the present provisions may have to be extended regarding some of the objects and purposes of a strike, it considered that some limitation would have to be maintained.

647. The principles of the ILO on this subject are clearly stated by the Committee of Experts on the Application of Conventions and Recommendations:

> The Committee considers that trade union organisations ought to have the possibility of recourse to protest strikes, in particular where aimed at criticising a government's economic and social policies. However, strikes that are purely political in character do not fall within the scope of the principles of freedom of association.[22]

and by other supervisory bodies:

> The right to strike should not be limited solely to industrial disputes that are likely to be solved by the signing of a collective agreement; workers and their organisations should be able to express in a broader context, if necessary, their dissatisfaction as regards economic and social matters affecting their interests.[23]

648. The Commission accordingly concludes that the regulation of "strikes" in section 1(1) and section 65(1A) should be amended so as to safeguard the legality of strikes over social and economic issues affecting workers' and trade union rights.

649. COSATU complained about the LRA's restrictions on strike activity during the currency of agreements, awards or determinations or during the first year of a wage determination.

650. The Government pointed out that these restrictions amounted to mere postponements of permissible strikes. For example, as far as wage determinations were concerned, strikes could take place after the expiry of the 12 month period.

651. The Commission does not believe that these merely temporary restrictions infringe ILO principles.[24]

(iii) Essential services

652. COSATU first called for the narrowing of the list of services contained in section 46 of the LRA where compulsory arbitration is substituted for strike action. Secondly, it submitted that, in those services correctly recognised as essential where the right to strike may be restricted, there were nevertheless certain employees such as support staff whose tasks were not part of the essential service provided and who should therefore be allowed to strike. Thirdly, it requested that, in genuinely essential services, some form of compensatory mechanism such as conciliation, mediation and arbitration be introduced, or, where it already existed, be strengthened.

653. The Government maintained that the essential service employees deprived of the right to strike under the LRA did have an adequate form of disputes resolution procedure through compulsory arbitration, although it admitted that such compensatory machinery was not available to certain "essential" employees banned from striking under other legislation.

654. The Government cited the relevant ILO principles on the right to strike in essential services and the public service.[25] It was thus aware of the fact that essential services in the strict sense of the term should be limited to those where an interruption would endanger the life, personal safety or health of the whole or part of the population, and that the public service should not be defined too broadly in the context of industrial action.

655. COSATU referred correctly to examples of services listed in the LRA which, according to freedom of association principles, are not "essential" in the strict sense of the term. In particular, this is the case for the following: local authorities except when they provide essential services in the strict sense of the term, passenger transportation, the handling of perishable foodstuffs and petrol or other fuels for use by public utilities.[26]

656. The Commission is of the view that section 46 should be amended so that strike action is restricted only in those services which are genuinely essential in terms of the ILO definition mentioned above.

657. Employees in certain essential services have no dispute settlement machinery available to compensate for the removal of their right to take industrial action. Prison officers and nurses are examples. This is not acceptable. Measures should be taken promptly to allow such workers access to adequate machinery so that their occupational grievances can be heard.

658. The Commission has no comment on the situation of the police and members of the armed forces referred to by COSATU, as they may be excluded from the ILO's freedom of association principles. The position of armaments workers, however, should not, in the Commission's opinion, differ from that of other workers since, in periods of peacetime, they are not carrying out essential services. They are clearly not members of the armed forces covered by the Defence Act.[27]

659. The Commission notes from the many examples presented to it in evidence that the system of arbitration established to replace the right to strike in the services listed in section 46 of the LRA is not working satisfactorily. As described elsewhere in these conclusions, technical objections might invalidate the establishment of industrial councils or conciliation boards. Awards won there might not be promulgated. The Industrial Court and Labour Appeal Court structures are overloaded, poorly resourced and their decisions have given rise to complaints of inconsistency. This no doubt explains the relative success of private mediation which has sprung up outside the statute. The Government has recognised that these shortcomings have resulted, on occasion, in grave injustices being committed. The Government should actively pursue improvements to the procedures with a view to affording to the workers concerned adequate, impartial and speedy conciliation, mediation or arbitration procedures, in which the parties can take part at every stage and in which the awards are in all cases binding on both parties and are fully and rapidly implemented.

(iv) Pickets

660. COSATU alleged that the security legislation, the Trespass Act and municipal by-laws have had the effect of outlawing strike pickets and of exposing strikers involved in such activities, even if doing so peacefully, to criminal and civil actions.

661. The Government's submission was that workers and their organisations should respect the law of the land. The Government nevertheless conceded that there was a need to examine the effects which the statutory provisions and common law had on picketing.

662. The ILO supervisory bodies have stated that pickets organised in accordance with the law should not be subject to interference by the public authorities and that the prohibition of strike pickets is justified only if the strike ceases to be peaceful.[28] They accept that there may be some statutory duty on pickets not to disturb public order or intimidate workers who continue to work and that picket violence and coercion of non-strikers can constitute criminal offences.[29]

663. Peaceful picketing should be protected by law. The use of criminal and civil sanctions against workers involved in picketing should be confined to situations of violence. In this way the principles of freedom of association would be respected: both the right of workers and their organisations to carry out their protest actions, and their duty to respect the law of the land.

(v) Sanctions for striking

664. Amongst COSATU's principal complaints about the present South African labour law was the liability of strikers and their unions to prosecution under criminal provisions; interdicts (injunctions); damages claims though civil actions; and dismissal. Protection against unfair reprisals for strike action at the hands of employers is, according to COSATU, erratic and uncertain even when the strike has been called in conformity with all the requirements of the LRA. The delays occasioned by the operation of the legal system are sometimes very considerable.

665. The Government considered that it was impossible to legislate rules in this regard and that the unfair labour practice procedure, which applied the rules of fairness and equity, should be adequate to deal with this

difficulty. It recognised, however, the fundamental importance of clarifying the uncertainty and addressing the inadequacy of protection under the LRA and asked for advice on how to improve the present Industrial Court system and streamline its operations. It considered that this would largely solve the problem.

666. The Commission concludes that legislative or common law provisions which expose workers and their unions to actions for damages and/or interdicts in respect of the legitimate exercise of the right to strike may effectively deprive workers of their right to take action to promote and defend their economic and social interests. It is therefore most important that some measure of protection against civil liability be maintained and that the immunities available under section 79 of the LRA are not weakened or completely avoided because of technical irregularities in the calling or conduct of strikes.

667. Similarly, the Commission considers that the imposition of criminal sanctions on strikes declared solely for the promotion or defence of workers' occupational interests is contrary to the principle of the right to strike.[30] Such sanctions should be imposed only where there have been violations of strike prohibitions which are themselves in conformity with the principles of freedom of association.[31] It is clear from the Commission's conclusions (see paras. 639 to 659 above) that several of the strike prohibitions are not in conformity with the principles.

668. Dismissal of trade unionists for exercising the right to strike is contrary to the principle of freedom of association:

> When trade unionists are dismissed for having exercised the right to strike, [it] can only [be] concluded that they have been punished for their trade union activities and have been discriminated against contrary to Article 1 of Convention No. 98.[32]

669. COSATU alleged that, although possible in the course of unfair labour practice proceedings, reinstatement of unjustly dismissed strikers almost never occurred. The ILO supervisory bodies have stated:

> The use of extremely serious measures, such as dismissal of workers for having participated in a strike and refusal to re-employ them, implies a serious risk of abuse and constitutes a violation of freedom of association.
>
> and
>
> Industrial relations troubled by the collective dismissal of strikers can be greatly improved if the employers concerned give serious consideration to the possibility of reinstating the persons thus sanctioned.[33]

670. The Commission is of the opinion that the unfair labour practice provisions of the LRA should be amended to provide appropriate protection against dismissal:

- of strikers engaged in a legal strike; and
- of strikers where the strike, although technically illegal, was in all other respects legitimately called for the promotion and defence of the workers' economic and social interests.

(f) Protection of the right to organise

(i) Attacks on trade unionists and trade union premises

671. The Committee on Freedom of Association has found that "a genuinely free and independent trade union movement cannot develop in a climate of violence and uncertainty".[34] It is from this perspective that the Commission has examined the submissions of the parties in relation to the attacks on trade unionists and trade union premises.

672. Self-evidently, the extent of violent crime in South Africa as revealed in the evidence is extremely serious. The substantial number of allegations concerning specific occurrences in relation to trade unions is also serious. Plainly, it has implications for the life and security of trade unionists, and undermines the legitimate work of trade unions. Before the Commission it was not disputed that such violence has occurred, nor that trade unions were the victims.

673. The Commission was not required by its mandate to make a detailed examination of the numerous instances cited in testimony.

674. In response to COSATU's submissions and evidence, the Government put forward several arguments. These included:

- that violence is endemic in South African life ("an unfortunate fact of life", as it was described);
- that most of the incidents cited in evidence had occurred before 2 February 1990;
- that the matter was being addressed by CODESA;
- that the police were investigating allegations that had been made; and
- that attitudes and behaviour developed under apartheid could not be expected to change suddenly.

675. The Commission wishes first to deal with the argument alleging that there had also been violence at the instance of trade union members. Little evidence was presented to it on this question. Some was, however, contained in the testimony of witnesses introduced by COSATU itself. Some was also offered in evidence from employers' representatives. Some also emerged from the documentary material presented by those who appeared before the Commission.

676. The Commission accepts the fact that trade unionists were not the only victims of violence. In the cases where violence was said to have been used by workers, this was investigated either independently or by the police. It is only proper that this should have been the case. Unfortunately, it is by no means clear that such vigilance has always been demonstrated in respect of the many incidents of anti-union violence cited by COSATU.

677. The very fact that the Government recognises that violence is a feature of the current situation in South Africa indicates that it requires urgent attention. The appointment of the Goldstone Commission (see paragraph 685 below) demonstrates the seriousness attached to the problem by the Government.

678. It is true that many of the instances cited by COSATU relate to the period before February 1990. This is not, however, so in respect of all the matters drawn to the attention of the Commission. Nor does the Government address the pattern of violent and destructive attacks on trade unions and trade unionists which emerges from the evidence.

679. The problem does not appear to have been of a temporary nature, even if the incidence of attacks seems to have diminished recently. The allegations suggest the existence over a period of years of a pattern of violence and disruption affecting trade unions and their members. This may well have been occasioned in part by the nature of the society in which it occurred. If so, it would seem the more necessary that every effort be made to create confidence in the opportunities for redress by those who have been amongst its victims.

680. The Commission has noted the appeal made in the statement tendered on behalf of the police that COSATU should come forward with additional information on the incidents mentioned in its submissions. It may prove possible to satisfy this request, where such information has indeed been lacking and could have a bearing on resolving the cases in question. It is inevitable that such a lack of apparent diligence on the part of the police in the past would have affected COSATU's confidence in the utility of providing additional information. According to the police evidence, there is a duty under the Police Act to investigate any serious offence involving injury to persons or damage to property. Virtually all of the instances cited by COSATU were reported in the press. In the circumstances, it must be said that it is astonishing that approximately half the cases do not appear to have been investigated at all. Even if adequate information were not immediately available from victims, initial inquiries might have been instituted by police, alerted by such reports. Attempts ought to have been made to seek additional evidence. The failure to do so reflects poorly on the police attitude. The want of proper police protection had an inevitable impact on trade unions and trade union rights.

681. In the minority of cases of complaint which were investigated by police a like conclusion follows. Fully three-quarters of these cases produced no result at all. One very serious case, involving very substantial material damage to COSATU's headquarters, does not appear to have been followed up by criminal charges. The conclusion is inescapable. To a very large extent COSATU and other unions, and their members, were outside the protection of the law as enforced by the police. For the proper attainment of the ILO standards of freedom of association, this situation must change.

682. Before leaving this topic, another aspect of the evidence must be mentioned. It relates to the problems created by the jurisdictional limits of different police forces deriving from the establishment of homelands. In such territories authority on the part of the South African police is limited by South African law. That law should not be treated as a way of avoiding the responsibility of South African authorities for actions which warrant investigation wherever occurring. The eventual solution to this problem depends on the dicussions in CODESA concerning the readmission of such territories into South Africa. But in the meantime, immediate operational arrangements between the police services should be provided for.

683. From the evidence presented on behalf of the police it would appear that criminal charges were preferred in only one serious case of the 70 or more referred to by COSATU. The lamentable result was that of three persons charged with murder in that case, none was convicted.

684. The Government's argument that attitudes developed under apartheid could not be expected to change overnight is unconvincing. Perhaps it was intended to refer to the attitudes of the police. Perhaps it was a reference to the apprehensions of COSATU and its witnesses. In neither case should it be accepted that activity involving violence against trade union members, their families and their homes, or to trade unions and their property is a matter for complacency on the part of the authorities. A new attitude must be adopted by police if they are to win back confidence on the part of COSATU and like victims of violence and loss. To the extent that the old attitudes survive in the police, they must be regarded with the utmost gravity. They require deliberate, sustained and strenuous efforts aimed at overcoming the threat they pose to life, safety and orderly society.

685. The police witness acknowledged the role to be played in this regard by the Commission of Inquiry established to investigate public violence, chaired by Mr. Justice R.J. Goldstone. This was set up under the Peace Accord of September 1991 (not by CODESA, whose mandate does not appear to relate to violent crime, or to trade unions as such). It is not clear whether the terms of reference of the Goldstone Commission would enable it to investigate all or any of the matters referred to in the submissions of COSATU to this Commission, particularly those concerning events which occurred prior to 2 February 1990. This Commission is aware of the heavy burdens already imposed on the Goldstone Commission. Nevertheless, a suitable means should be found under South African law so that outstanding cases of unresolved violence directed at trade unions and their members may be reopened. Such violence should not simply be accepted. It strikes at institutions and individuals vital to a free society.

686. The ILO's principles on freedom of association make it clear that:

> A climate of violence such as that surrounding the murder or disappearance of trade union leaders constitutes a serious obstacle to the exercise of trade union rights; such acts require severe measures to be taken by the authorities; and that
>
> Situations involving murder and other acts of violence, where trade unionists are involved, are sufficiently serious to warrant severe measures being taken by the authorities to restore a normal situation.

Similarly, the Committee on Freedom of Association has drawn attention to the importance of the principle that the property of trade unions should enjoy adequate protection.[35]

687. Accordingly the South African Government should take all the steps necessary to ensure that these principles are implemented in respect of the events which have already occurred. It should set in place the safeguards necessary to prevent any recurrence of the kind of violence and attacks which were described in evidence before the Commission - whether by the police or otherwise. Practical measures, such as the establishment of trade union-police liaison committees and police education on trade union functions and rights should be instituted without delay.

(ii) Government interference in trade unions

688. Parallel to the matters raised in the evidence already mentioned were numerous other instances of alleged interference by the police in relation to trade unions and trade union officials, and trade union activities, including strikes. The apparent frequency of police involvement in such activity, as disclosed by judicial inquiries and acknowledged by the

State President, help to explain the lack of apparent enthusiasm on the part of the police to act so as to protect trade unions and their members, as well as their property.

689. It is clear from the evidence that spying on, and surveillance of trade unions by the South African authorities was, at least until very recently, an established feature of unionism in South Africa. So much was demonstrated by two judicial Commissions of Inquiry (chaired by Mr. Justice Harms and Mr. Justice Hiemstra, respectively). These inquiries dealt, in turn, with the activities of the Civil Cooperation Bureau which operated under the aegis of the South African Defence Force, and with the officials of the Johannesburg City Council who supplied information to that government agency after spying on trade unions. Such official conduct directed at the legitimate activities of trade unions and their members is completely incompatible with international standards governing trade union rights. Such standards are designed to enable trade unions to carry out their functions in full freedom from interference by the Government. In the future there should be scrupulous conformity with these standards by all agencies of the South African State and all other agencies which it controls or influences in the homelands. Safeguards should be established to ensure that this objective is attained. These could range from appropriate procedures of internal auditing and official reports to external, independent machinery for considering and investigating complaints by trade unions, their members and others.

690. The financing by the Government, through the police, of a private company the function of which was admitted by the Minister of Law and Order to involve intervention in labour matters is, for like reasons, completely incompatible with ILO principles. It should not be repeated. The safeguards already referred to should monitor and publicly report compliance with this requirement.

691. The appointment of the two judicial commissions constituted an acknowledgement by the Government of South Africa that remedies were to be sought where such activities were said to have occurred. The Minister's statement, referred to above, appears to demonstrate a similar attitude. Nevertheless every possible step should be taken to prevent the recurrence of any such activity on the part of any agency of the Government, whether civilian or military.

(iii) Government funding of the United Workers' Union of South Africa (UWUSA)

692. The admissions made by the Government concerning the covert funding of UWUSA fall into a similar class. According to the statement by the State President, funds amounting to R1,500,000 were provided through the police. This happened in the context of the funding by the Government of other bodies allegedly as part of its efforts to combat the campaign of sanctions against South Africa. A public undertaking has now been given by the State President that such actions were being brought to an end as sanctions were being terminated.

693. The secret provision of funds by the Government to this trade union organisation constituted a clear violation of the ILO standards contained in Convention No. 87. It detracted from the capacity of the union to act as an independent body. It involved favoured treatment in ways which were incompatible with the terms of the ILO Convention. The principles relating to this type of activity have been expressed by the Committee on Freedom of Association in the following terms:

> By according favourable or unfavourable treatment to a given organisation as compared with others, a government may be able to influence the choice of workers as to the organisation which they intend to join. In addition, a government which deliberately acts in this manner violates the principle, laid down in Convention No. 87, that the public authorities shall refrain from any interference which would restrict the rights provided for in the Convention or impede their lawful exercise; more indirectly, it would also violate the principle that the law of the land shall not be such as to impair, nor shall it be applied so as to impair, the guarantees provided for in the Convention. It would seem desirable that, if a government wishes to make certain facilities available to trade union organisations, these organisations should enjoy equal treatment in this respect.[36]

694. The language used in the Government's statement on this matter is not free from ambiguity concerning when precisely such activities may be expected to cease. All necessary steps should be taken immediately to avoid any such discrimination, favouritism and political interference in trade unions and trade union activities. Such conduct is completely incompatible with ILO standards.

(iv) Employer restrictions on access to premises

695. The evidence placed before the Commission on trade union access to members and potential members on employer premises concerned, for the most part, the situation in mines, and, to a lesser extent, on farms as well as that affecting domestic workers. Between them, these three sectors employ very large numbers of the South African workforce. Their positions are not, however, the same.

696. Farmworkers and domestic workers are excluded from the provisions of the LRA. Unions thus have no statutory right to any form of contact with these workers. Nor may they, or the workers, proceed against employers for alleged unfair employment practices where they are denied access or are victimised. On the contrary, union representatives may (and, on the evidence, frequently do) expose themselves to prosecution under the provisions in the Trespass Act.

697. The protection provided under the LRA should be extended in this, as in other matters, to the foregoing categories of workers. The Commission is aware that proposals are already being considered in this regard by, among others, the NMC. Workers, and trade unions seeking to represent them, should be assured by law of the opportunity to function freely and to undertake the activities envisaged by Article 3 of Convention No. 87. They should be able to do so without any interference or impediment on the part of the authorities.

698. The position of workers in the mining industry is clearly different. In this case, the workers are already covered by the LRA. The principal union (NUM) has been registered under the LRA. It carries out functions in relation to mines where it has been recognised. Indeed, COSATU's allegations (and the evidence) concerned the restrictions which arose pursuant to agreements entered into by the NUM with mine employers principally members of the Chamber of Mines. The restrictions appear in practice to have been imposed by individual mine managements. They have affected a large number of matters relating, among other things, to the recruitment of members, the holding of meetings and the use of mine premises for union business.

699. It is clear that the problems which have arisen have largely been occasioned by the fact that the agreement concluded in 1983 between the mine

owners and the NUM permitted such questions to be regulated at the level of individual mines rather than that of the industry as a whole. This arrangement presented numerous opportunities for friction and disagreement:

- permission had to be sought in a large number of individual instances;
- the response was neither uniform nor predictable; and
- conditions of great particularity were frequently imposed, some of a formal or procedural nature, some entailing the exertion of proprietary control, and yet others involving matters such as photo-surveillance, specifications concerning agenda and the conduct of meetings, including who was entitled to speak on these occasions and by what means they could address them.

700. The foregoing disputes arose as a result of a procedure contained in a collective agreement entered into between the Chamber of Mines and the union. It is difficult to criticise the requirement for permission. However, the particular conditions of work which typically prevail in the mining industry in South Africa entailing residence on mine property, with little or no choice for the workers in that regard, present a peculiar dilemma. They create special circumstances which need to be taken into account in judging the reasonableness or otherwise of denying opportunities for union meetings in such an environment. Unreasonable refusals or the imposition of unreasonable conditions could, depending on the circumstances, amount to unfair labour practices under the LRA. This would be especially so where conditions imposed by mine managers amounted to an unwarranted interference in the internal affairs or the free functioning of unions.

701. The agreement reached in 1983 was, however, superseded by a new agreement concluded between the Chamber of Mines and the NUM in 1991. This expressly provides that access may not be withheld unreasonably if certain procedural requirements are complied with. It also provides a dispute settlement provision for the voluntary resolution of differences by arbitration. In its written submissions SACCOLA has pointed out that this provision has not been invoked.

702. The evidence given on behalf of the employers conceded that confinement of mine workers to residence on mine property was undesirable in principle and to be discouraged in the future. On the other hand, this practice was sustained by some of the manpower laws of the apartheid system. It is no longer required by law because of the repeal of the applicable apartheid laws. But the practical conditions governing the living arrangements of mineworkers endure as a legacy of earlier times.

703. Until individual housing comes to succeed housing in mine compounds, it is important that access should be granted freely to unions for the purpose of carrying out normal union activities although on the premises of employers. Such activities legitimately involve recruitment and regular contact with members. There should be less need to resort to the courts under the rules concerning unfair labour practices, especially because of the provision in the 1991 agreement for voluntary arbitration.

704. According to the evidence, restrictions of the kind referred to by COSATU and its witnesses have continued to be imposed since the 1991 agreement came into force. In respect of some of them it may not be possible to invoke the new agreement. The union may not have been recognised. Mines other than those forming part of the Chamber of Mines may be involved. In such cases, as in others, remedies should be found which take into account the special

difficulties which have arisen historically over access to mineworkers by reason of the mine compound system.

705. Considerations affecting tied housing apply equally to farmworkers and domestic workers. The same factors should accordingly be taken into account where access to such workers is denied to unions. Bringing such workers within the framework of the LRA is obviously the first step in providing them with protection in this regard.

706. Those with responsibility for formulating suitable procedures and practices for the regulation of access to workers by trade unions and trade union officials should take into account the Workers' Representatives Convention, 1971 (No. 135) and the provisions of the corresponding Recommendation (No. 143).[37]

707. A remaining issue relates to the use of homelands (and their legislation, or want of it) to frustrate access by unions to their members in circumstances where access would otherwise be desirable. Instances of this problem came to the attention of the Commission in relation to Bophuthatswana and the Ciskei. The case involving the latter allegedly amounted to a deliberate attempt by a company to manipulate territorial jurisdiction in order to deny a union the rights of access to its members. This is yet another illustration of the way in which the homeland system may be used to facilitate practices at variance with those which conform to the ILO standards which should determine such matters. The Government of South Africa, as the Government responsible in international law for conformity of homelands law with international principles, should take all steps necessary to ensure that homelands law is brought into compliance with such basic principles.

(g) Collective bargaining

(i) Interference in collective bargaining agreements and procedures

708. Section 48(1) of the LRA gives the Minister of Manpower a discretion to promulgate or not to promulgate agreements freely concluded in industrial councils. On the one hand, COSATU submitted that the Minister's exercise of his discretion to refuse three agreements in recent years as being politically unacceptable was not justified under ILO principles. On the other hand, it appears that non-registration does not mean that such agreements are not enforceable at all, simply that the common law remedies for breach of contract would apply rather than the enforcement procedures of the LRA.

709. The ILO's supervisory bodies have always stressed the importance of voluntary bargaining between the parties, with the public authorities refraining from any interference in order to modify the contents of freely concluded agreements.[38] Any intervention could only be justified for major economic and social reasons and in the general interest.[39]

710. The Commission is not required by its mandate to examine the exercise by the Minister of his discretion in particular cases. However, if the principle of non-interference in freely concluded agreements is to be respected, section 48(1) should be amended in order that the Minister's role in checking concluded agreements remains a technical one. Its purpose should simply be to verify questions of form or compliance with overriding statutory provisions, such as the minimum standards set out in the labour law. In such

a context, once he has been presented with a request for promulgation, he should proceed to do so without intervening in the contents.

711. Similarly, with regard to the Minister's powers to exempt or exclude certain areas or classes of work from the agreement, or parts thereof, or to promulgate proposals on employment conditions coming from the employers' side alone (under sections 51(12) and 51A respectively), the Commission recalls the importance of the autonomy of the parties to the bargaining process. If the Minister can, on undefined grounds of "public or national interest" or "the interest of persons", or "of employers or employees" declare inoperative for certain areas or classes of work the provisions of freely concluded agreements, that autonomy is undermined. If employers - after the Minister's consultation with a wage board, but not with employees - can impose their choice of conditions of employment in any undertaking, industry, trade or occupation in an area where there is no industrial council operating, collective bargaining is jeopardised. As pointed out in Chapter 6, the number of industrial councils decreased from 105 in 1980 to 91 in 1990.

712. COSATU also referred to situations where employers had exploited technicalities in the law or created obstacles in practice, to avoid procedures for collective bargaining.

713. The Commission stresses that:

> Recognition by an employer of the main unions, or the most representative of these unions, is the very basis for any procedure for collective bargaining on conditions of employment in the undertaking.[40]

714. It also notes that other panels of the Fact-Finding and Conciliation Commission have emphasised that satisfactory labour relations depend primarily on the attitudes of the parties towards each other and their mutual confidence.[41]

715. It is the view of the Commission that the Government should take measures to ensure that unions facing these kinds of obstacles to collective bargaining have a means of redress, where the procedures are swift and decisions enforceable. A system of certification for bargaining purposes would go some way towards overcoming the present problems in this area. Such a system for determining collective bargaining agents would have to be based on objective and pre-established criteria[42] and should include special procedures for the award of damages or the application of sanctions where an employer refuses to recognise the designated representative union or does not bargain with it in good faith.[43] In this connection, the Commission recalls the large amount of evidence given referring to the need to streamline and improve the current structures for redress in the Industrial Court and Labour Appeal Court.

(ii) Provision of facilities for collective bargaining

716. COSATU seeks statutory entrenchment of various organisational rights such as access to employers' premises, which it believes are essential to the collective bargaining process. It acknowledged that certain qualifications on these facilities, such as access "at reasonable times", might be necessary. Such facilities should, in COSATU's submission, be enforceable through the Industrial Court or the ordinary courts using urgent actions so as to avoid long delays which, as has been shown in past cases, lead to confusion and frustration.

717. Noting the special circumstances pertaining to the mining and agricultural sectors where workers live and work on the employers' premises, the Commission attaches special importance to the principle that the entry of trade union officials onto such property for the purpose of carrying out lawful trade union activities should be readily permitted, provided that there is no interference with the carrying on of the work during working hours and subject to any appropriate precautions being taken for the protection of the property.[44]

718. The Commission considers that the Government could receive guidance in this respect from the ILO Workers' Representatives Recommendation No. 143 of 1971 which lists, in Part IV, those facilities to be afforded to workers' representatives in order to enable them to carry out their functions promptly and efficiently, taking into account the characteristics of the industrial relations system of the country and the needs, size and capabilities of the undertakings concerned. Given the specific circumstances pertaining to the mining and agricultural sectors, where employees work and live on employers' premises, Clauses 12 and 17 of that Recommendation are particularly apposite:

> Workers' representatives in the undertaking should be granted access to all workplaces in the undertaking, where such access is necessary to enable them to carry out their representation functions.
>
> Trade union representatives who are not employed in the undertaking but whose trade union has members employed therein should be granted access to the undertaking.

719. In the interests of more efficient collective bargaining, the Commission would hope that the other facilities referred to by COSATU (space for union business and meetings; time off for union business or training; access to information for negotiation purposes) should be accorded to the unions either through national laws or regulations or collective agreements, as is evisaged by Article 6 of the Workers' Representatives Convention, 1971 (No. 135).

(iii) Impact of other statutes on collective bargaining

720. COSATU submitted that three specific statutes[45] gave employers greater weight on statutory safety and technical committees. It called for their amendment so as to ensure parity of representation.

721. The Government pointed out that COSATU's objection, in particular to the composition of manpower training boards, was receiving attention.

722. The Commission concludes that questions such as these fall outside the field of freedom of association, strictly speaking. It would nevertheless point out that, if such safety committees and technical boards are to fulfil their functions satisfactorily, it would be advisable that the representatives participating in them should have the confidence of both the workers and the employers in the undertakings or industries concerned.

(h) Protection of workers excluded from the Labour Relations Act

(i) Farmworkers and domestic workers

723. The exclusion of farmworkers and domestic workers from the provisions of the LRA is one of the most serious problems affecting freedom of association in South Africa. It is contrary to the basic principles of the ILO.[46] The result is that, although there is nothing in South African law which prohibits these workers from forming or joining the trade union of their choice, there is, at the same time, nothing which protects farmworkers and domestic workers from being victimised or dismissed (with consequential eviction in most cases from their homes) for trade union membership or activities. Mention was made of the anti-victimisation provisions in the Manpower Training Act, 1981. However, these provisions are little known and of limited effectiveness. Moreover, the absence of an effective statutory framework means that their unions have no legal basis on which they can claim the right to bargain collectively on behalf of their members, nor do the workers or their unions enjoy any protection in the event of strike action.

724. The absence of provisions ensuring to farmworkers and domestic workers the full range of trade union and collective bargaining rights deprives these workers of the means of effectively promoting and defending their interests through their representative organisations. The Commission had evidence of the very poor working and living conditions affecting many of these workers. This was acknowledged by the Government. For these reasons, the Commission attaches the greatest importance to the early enactment of legislation extending the above-mentioned rights to farmworkers and domestic workers.

(ii) The public sector

725. The submissions and evidence before the Commission concerning public servants in the central government departments, post office, police service, prison service, teaching profession and nursing profession demonstrated the significant disadvantages they suffer under South African industrial relations law. The combined effect of the various enactments governing these different branches of the public sector, and of practice in those branches, may be summarised as follows.

726. Trade unions or staff associations may be formed freely by public servants except in the police and prison service, where they require the permission of the Commissioner of Police or Prisons as the case may be. This limitation on the freedom of association of the police is consonant with the terms of Article 9 of Convention No. 87, but the functions exercised by prison officers are not considered to justify such a restriction of their right to organise.[47]

727. Trade unions composed wholly of persons employed by the State may be registered under the LRA. As indicated above[48] the prohibition, still in force, of the registration of mixed public and private sector unions is acceptable as long as public sector unions can freely join trade union federations or confederations. However, evidence was given that under the Public Service Regulations a public service association may be refused recognition by the Commission for Administration, or recognition may be withdrawn, if it affiliates with a federation of trade associations without the approval of the Commission for Administration. In view of the possible impact of this restriction on the freedom of association of public servants,

it should either be modified or the amendment to section 2(3)(b) of the LRA allowing the registration of mixed unions should be brought into force.

728. COSATU has referred to provisions in the various statutes governing different branches of the public service which define misconduct to include attempts by an employee to secure the intervention of any person "not in the employ of the department" in relation to his or her position or conditions of service. It has submitted that such provisions interfere with the right of employees to elect their representatives freely. If, as COSATU contends, they are interpreted as meaning that staff association representatives must belong to the occupation in which the association functions and that such representatives from outside the occupation may not put forward claims on the members' behalf, these provisions may jeopardise the right of organisations, guaranteed by Article 3 of Convention No. 87, to elect their representatives in full freedom.

729. In the absence of legal provisions governing strikes in the public service, they are covered by the common law, according to which strike action has conventionally constituted serious misconduct entitling the employer to dismiss public servants summarily.

730. The principles developed by the ILO organs concerning strikes in the public sector recognise that the right to strike may be restricted or even prohibited in the civil service - civil servants being those who act on behalf of public authorities.[49] This principle was set out more fully by the Committee of Experts on the Application of Conventions and Recommendations in the following passage:

> ... [T]he principle whereby the right to strike may be limited or prohibited in the public service or in essential services, whether public, semi-public or private, would become meaningless if the legislation defined the public service or essential services too broadly. As the Committee has already mentioned in previous general surveys, the prohibition should be confined to public servants acting in their capacity as agents of the public authority or to services whose interruption would endanger the life, personal safety or health of the whole or part of the population. Moreover, if strikes are restricted or prohibited in the public service or in essential services, appropriate guarantees must be afforded to protect workers who are thus denied one of the essential means of defending their occupational interests. Restrictions should be offset by adequate impartial and speedy conciliation and arbitration procedures, in which the parties concerned can take part at every stage and in which the awards should in all cases be binding on both parties. Such awards, once rendered, should be rapidly and fully implemented.[50]

731. Applying these principles to the various branches of the public service in South Africa, it would seem that, at the very least, the possibility of strike action should be opened up for members of the teaching profession and post office personnel, subject to the possible need to ensure the maintenance of a minimum service which should be defined in consultation with the organisations of the workers concerned.[51] Where prohibitions or restrictions on strike action are maintained, these should be offset, as indicated by the Committee of Experts, by adequate, impartial and speedy conciliation and arbitration procedures.

732. The provisions of the LRA governing collective bargaining and the settlement of disputes do not apply to the public service. In the absence of collective bargaining procedures, staff associations - which may or may not be recognised by the employing authority - are in most cases given the

opportunity to make representations regarding salaries and other conditions of employment.

733. This limited facility falls short of the principles established in the relevant ILO Conventions and the jurisprudence developed around them. Under Article 6, Convention No. 98 does not deal with the position of public servants engaged in the administration of the State. However, the Convention does apply to other public servants (except that the armed forces and the police may be excluded). It provides in Article 4 that:

> Measures appropriate to national conditions shall be taken, where necessary, to encourage and promote the full development and utilisation of machinery for voluntary negotiations between employers or employers' organisations and workers' organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements.

734. The Labour Relations (Public Service) Convention, 1978 (No. 151), which applies to all persons employed by public authorities (with the possibility of excluding high-level employees whose functions are normally considered as policy-making or managerial, and employees whose duties are of a highly confidential nature as well as the armed forces and the police) provides as follows:

> Article 7
>
> Measures appropriate to national conditions shall be taken, where necessary, to encourage and promote the full development and utilisation of machinery for negotiation of terms and conditions of employment between the public authorities concerned and public employees' organisations, or of such other methods as will allow representatives of public employees to participate in the determination of these matters.
>
> Article 8
>
> The settlement of disputes arising in connection with the determination of terms and conditions of employment shall be sought, as may be appropriate to national conditions, through negotiation between the parties or through independent and impartial machinery, such as mediation, conciliation and arbitration, established in such a manner as to ensure the confidence of the parties involved.

735. A further point on which the provisions of South African law governing public servants fall short of the ILO principles[52] is the absence of any provision protecting them against anti-union discrimination, since section 78 of the LRA does not apply to them.

736. The inadequacies of the present provisions are recognised by the Government, which accepted in its submissions to the Commission that the rights of public servants must be protected by legislative enactment. The Government has committed itself, in the Laboria Minute, to establish, through a process of negotiation with representative bodies, effective and mutually acceptable arrangements for labour relations in the public sector.

737. Legislation which conforms with the principles described above should be promptly enacted. It should:

- regulate the right to strike;

- extend protection against anti-union discrimination to all public sector employees; and

- introduce a system for the negotiation and determination of terms and conditions of employment of employees in the various branches of the public service which provides for the participation of their representative organisations in accordance with the principles established in the Conventions quoted above.

(iii) "Self-governing" territories and "national states"

738. The result of the granting of internal self-government to six "self-governing" territories and of independence from South Africa to four "national states" is that there is a patchwork of 11 different labour relations systems interacting in South Africa, with consequential difficulties for workers, trade unions and employers.

739. The Government has recognised that the present system, with its anomalies, is unsatisfactory. It has committed itself to a process of harmonising the labour laws of the "self-governing" territories into one labour relations system.

740. As far as the "national states" to which South Africa claims it has granted constitutional independence are concerned (Bophuthatswana, the Ciskei, Transkei and Venda), the Government's position is that these are independent states in whose internal affairs it cannot intervene. The Commission cannot accept this argument. Whatever may be the position under South African law, in international law it has been repeatedly affirmed by the competent organs of the United Nations as well as by the supervisory bodies of the ILO that South Africa remains responsible for international obligations relating to the laws applicable in those territories.

741. From the information made available to the Commission, it appeared that many of the issues identified in these conclusions in relation to the LRA of South Africa are also relevant to some or all of the territories of the Ciskei, Transkei, Venda, KwaNdebele, KwaZulu and QwaQwa. The same conclusions and recommendations therefore, to that extent, apply.

742. In Gazankulu, Lebowa and Kangwane, the situation is much more serious in that the South African LRA - without the more recent amendments - is in force only for White and Coloured workers, so that there is no legislation at all under which Black workers can form and join trade unions or participate in collective bargaining. All that is open to them in Gazankulu and Lebowa is the possibility of setting up works committees at the level of the establishment under the Black Labour (Settlement of Disputes) Act, 1953, which, moreover, contains an absolute prohibition on strikes by Black workers. In Kangwane, not even this Act is in force.

743. In Bophuthatswana, as well as some of the same problems that arise under the inherited South African legislation, numerous additional restrictions affecting trade union rights and the collective bargaining process were identified by COSATU. These are summarised in Chapter 12 and relate to the exclusion of farm and domestic workers and public servants from the legislation; restrictions on the right of trade unions to draw up their constitutions, elect their officers and organise their activities and programmes; conditions for registration and restrictions on unregistered unions which amount to a requirement of prior authorisation; provisions

governing strikes which in practice preclude lawful strikes as well as a prohibition on strikes which is not limited to essential services; the absence of protection against anti-union discrimination; a collective bargaining system which does not function in practice, and the use of security legislation to restrict or prohibit trade union activities.

744. In addition to the violations of the principles of freedom of association identified in the individual homelands, the evidence drew attention to the serious problems caused for both employers and workers in South Africa by the terms of the differing labour relations laws in different parts of what is essentially a single economic area. Frequently employers operate in both one or more of the homelands and the rest of South Africa. Workers reside in one of the homelands and are employed in another part of South Africa or vice versa. Many workers in the homelands wish to join and be represented by a South African trade union, which the employer would be prepared to recognise for collective bargaining purposes but this is prohibited by the homelands legislation. Other examples could no doubt be given.

745. There are a number of ways open to the Government to resolve the present incompatibilities between the labour relations legislation of the homelands and the ILO principles of freedom of association. One possibility is that the CODESA negotiations will lead to the legislative powers of the "self-governing" territories being reassumed by the national legislature and to the reincorporation into South Africa of the TBVC states. This solution would mean that the existing legislation in the homelands would be replaced by the legislation applicable in South Africa generally, in respect of which the conclusions of the Commission appear above. A second solution is that which has been mentioned by the Government in its submissions to the Commission. This involves the harmonisation of the labour relations legislation of South Africa and the "self-governing" territories. It appears evident to the Commission that, if this approach is followed, the process of harmonisation should extend also to the TBVC states. Finally, if neither of these solutions succeeds, it is the Government of South Africa which remains responsible in international law for ensuring that the law and practice in each of the TBVC states as well as the "self-governing" territories complies with the international principles on freedom of association.

Notes

[1] Freedom of Association and Collective Bargaining. General Survey, International Labour Conference, 69th Session, 1983, Report III, Part IV(B), paras. 150 and 151; Freedom of Association: Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO, 3rd edition, 1985, para. 285. These sources are referred to in subsequent footnotes as "General Survey" and "Digest" respectively.

[2] See paras. 614 to 620.

[3] General Survey, para. 111.

[4] General Survey, para. 139; Digest, para. 231.

[5] General Survey, para. 126.

[6] Record of Proceedings, International Labour Conference, 35th Session, Geneva, 1952, p. 583.

[7] General Survey, paras. 187 to 188.

[8] _General Survey_, para. 177.

[9] _General Survey_, para. 188.

[10] _General Survey_, para. 250.

[11] _General Survey_, paras. 311 and 316.

[12] _General Survey_, para. 198; _Digest_, para. 356.

[13] _General Survey_, para. 195.

[14] See Annex VII for the terms of reference.

[15] _Digest_, paras. 154 to 156.

[16] _Digest_, para. 180.

[17] _Digest_, paras. 194 and 195.

[18] _Digest_, para. 77.

[19] _General Survey_, para. 219.

[20] _Digest_, para. 377.

[21] _Digest_, paras. 380 and 384.

[22] _General Survey_, para. 216.

[23] _Digest_, para. 388.

[24] _Digest_, paras. 390 and 392.

[25] _General Survey_, para. 214.

[26] _Digest_, para. 402.

[27] _Digest_, para. 421.

[28] _Digest_, paras. 432 and 433.

[29] _Digest_, paras. 434 and 435.

[30] _Digest_, para. 439.

[31] _General Survey_, para. 223.

[32] _Digest_, para. 443.

[33] _Digest_, paras. 444 and 445.

[34] _Digest_, para. 75.

[35] _Digest_, paras. 76, 80 and 338.

[36] _Digest_, para. 254.

[37] For the principal terms of these, see paras. 718 and 791 below.

[38] Digest, paras. 583 and 593.

[39] General Survey, para. 312.

[40] Digest, para. 618.

[41] Digest, para. 590.

[42] General Survey, para. 295.

[43] General Survey, para. 296.

[44] Digest, para. 220.

[45] See above, paras. 469 and 470.

[46] General Survey, paras. 76 and 329.

[47] General Survey, para. 87.

[48] See above, para. 590.

[49] Digest, para. 394.

[50] General Survey, para. 214.

[51] General Survey, para. 215.

[52] See Convention No. 98, Article 1, and Convention No. 151, Article 2.

CHAPTER 14

FINAL RECOMMENDATIONS

746. South Africa, after four decades of apartheid, is on the brink of important changes to its constitution, its economy and society. Changes have already occurred. This report is issued as a prelude to further and still greater reforms yet to come. The changes should ensure that basic civil liberties are provided by law and guaranteed in practice in a democratic society. The basic rights of freedom of association and collective bargaining should be seen for what they are: vital attributes of a free society. This is the perspective upon which the ILO has always insisted. The conclusions and recommendations in this report should all be read as directed to this fundamental objective. All of them are intended to contribute to the achievement of that end.

747. The evidence and arguments adduced in the course of the proceedings made it clear that the Government is aware of the need for reform in the trade union and labour relations field. This provides a hopeful framework within which the various issues and problems identified in the Commission's report can be addressed. In general terms, the Commission's recommendations can be summarised by stating that, in the ongoing reform process, action should be taken with respect to the specific points on which the Commission has concluded that measures are necessary in order to ensure that the international principles of freedom of association are fully respected.

748. More specifically, the Commission makes the following recommendations:

1. In accordance with the policy agreed between the parties, of submitting proposed labour relations legislation to a process of extensive consultation with the major actors in the labour relations arena with a view to reaching broad consensus on the applicable legislation, the first step - requiring the full participation of the trade unions and employers' organisations as well as the Government - must be to complete the restructuring of the National Manpower Commission in a manner which will ensure that it will function effectively and with the full support of all the parties concerned, and that its recommendations will be given prompt and favourable attention by the Government.

2. Priority must be given to the enactment of legislation extending to agricultural workers and domestic workers trade union and collective bargaining rights in common with other workers in South Africa.

3. The Government should also address urgently the serious problems posed by the existence of 11 different sets of labour relations legislation in the various territories into which South Africa is currently divided, with a view to ensuring that workers and employers throughout all of these territories enjoy the basic rights of freedom of association and collective bargaining.

4. Every effort should be made by all the parties concerned to resolve the outstanding issues in the ongoing negotiations concerning new legislation to govern labour relations in the public sector so that this legislation can be enacted as soon as possible. The Commission's conclusions on the issues placed before it concerning the public sector should be taken into account by the parties in these negotiations.

5. The work already undertaken to prepare a revised or consolidated Labour Relations Act should be pursued vigorously, with two major objectives. In the first place, in order to meet the Government's declared goal of respecting the international principles of freedom of association, the new Act should take full account of the Commission's conclusions concerning certain aspects of the present Act, and the need to amend a number of its provisions. These relate, in particular, to the present system for the registration of trade unions (section 4(3)), the control of the contents of their constitutions (section 4(5)(a)(ii) and (iii), section 8(4)(a)(iv), (6)(c) and (d) and (8)), to executive powers of interference in trade union affairs (section 12(1) and (3) and collective bargaining agreements (section 48(1), section 51(12), section 51A, section 78(IC)), and to restrictions, both substantive and procedural, on strike action (section 1(1), section 27A, section 35, section 46(1), (2) and (7), section 65(1)(d) and (2)(b), section 65(IA)).

6. Secondly, the new Labour Relations Act should be simplified, and structured in such a way as to be readily usable and understandable by all interested parties.

7. No trade union or employers' organisation should be entitled by law to limit its membership by reference to race. There should be a transitional period during which a special officer should be appointed with a statutory duty to facilitate, within a given time, the removal of all provisions whereby membership of such organisations, or the holding of office in them, is confined to persons of a particular race.

8. Security or other legislation which has been used in the past to restrict the right of trade unions to carry on their activities in full freedom should be reformed. The Government has emphasised that the legislation referred to is under review in the Convention on a Democratic South Africa (CODESA). The Commission therefore recommends that its conclusions, in particular concerning the Public Safety Act, the Internal Security Act, the Publications Act, the Fund Raising Act, the Affected Organizations Act and the Disclosure of Foreign Funding Act, should be brought to the attention of CODESA, or such other body as may be entrusted with responsibilities in these fields. Such conclusions should be taken into consideration with a view to ensuring that any future legislation on these matters respects the principles of freedom of association for employers' and workers' organisations.

9. The anti-union violence which has prevailed in South Africa is totally unacceptable. The Government has acknowledged that the violence requires attention. The Commission draws the attention of the Government to the importance of the principle that workers' rights must be based on respect for civil liberties. On the issue of government interference in trade unions and their activities, the Government should do everything possible to ensure that inquiries into such matters are not hampered by complacency. The situation should, on the contrary, be regarded with the utmost gravity. It requires deliberate, sustained and strenuous efforts aimed at overcoming the threat it poses to life, safety and orderly society. Given the Commission's finding that these circumstances do not conform to international standards relating to trade union rights, which are expressly designed to enable trade unions and their members to carry out their functions in full freedom without interference by the authorities, it considers that it is essential that every effort should be made to bring to justice those responsible for such interference, and, in particular, for acts of violence against trade unionists or trade union property.

10. The Commission also considers it essential that effective action should be taken by the responsible authorities to ensure that the Government's commitment to refrain from interference in the activities of trade unions and their members is respected by all public agencies. Practical measures to this end, such as the establishment of trade union-police liaison committees and police education on trade union functions and rights should be instituted without delay. Further safeguards could include appropriate procedures of internal auditing, official reporting, and external, independent machinery for considering and investigating complaints by trade unions and their members against the police and other public officials.

11. The Commission has called attention to the special difficulties surrounding union access to workers who both work and live on employer premises. This is particularly important in the mining industry and to some extent in the agricultural sector and for some domestic workers. The free functioning of workers' organisations is guaranteed by Article 3 of Convention No. 87. In the future, access should be granted more freely to unions for the purpose of carrying out normal union activities. If this is done there will be less tension and less litigation over access-related issues. Those responsible for formulating laws, procedures and practices for the regulation of access to workers by trade unions and their officials should ensure that they conform to the ILO standards in respect of freedom of association, paying particular regard to the Workers' Representatives Convention, 1971 (No. 135) and Recommendation No. 143.

12. In its closing arguments, the Government stated that it would welcome the advice of the Commission on how to improve the present Industrial Court system and streamline its operations so as to overcome the problems which were referred to in the evidence and arguments before the Commission. The giving of advice on such a complex and technical topic is a matter which would require much more extensive investigation than was possible for the Commission. It is, however, a subject on which the International Labour Office has a wide range of experience and expertise. If, therefore, the Government wishes to seek international advice or guidance in reforming the industrial court system, the Commission recommends that the Director-General of the International Labour Office should examine favourably any request from the Government of South Africa for assistance in this field.

13. Since South Africa is not at present a Member of the International Labour Organisation and has not ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), the Right to Organise and Collective Bargaining Convention, 1949 (No. 98), or the other Conventions referred to in this report, the ILO regular procedures are not available for monitoring the action taken by the Government to give effect to the Commission's conclusions and recommendations. However, in view of their importance for the future of labour relations in South Africa, and of the probable implications of any measures taken for South Africa's future role in the international community, the Commission considers it essential that the implementation of its report should be monitored. It therefore recommends that the Government of South Africa should be invited, through the Economic and Social Council as appropriate, to submit reports on the measures taken to give effect to the Commission's conclusions and recommendations, that ECOSOC should transmit such reports to the Director-General of the ILO and that he should provide any advice and comments which ECOSOC might wish to have on them.

14. The Commission recommends that widespread publicity be given in South Africa to this report, its conclusions and recommendations.

15. The Commission finally recommends that South Africa bring its law and practice into full conformity with Conventions Nos. 87 and 98, so that when the time comes for South Africa to become once more a Member of the International Labour Organisation, one of its first steps will be to ratify in particular these Conventions for the protection of fundamental human rights.

Geneva, 8 May 1992. (signed) Sir William Douglas,
Chairman

Justice Michael Kirby

Justice Rajsoomer Lallah.

* * *

In submitting this report, the members of the Commission place on record their appreciation to the Director-General of the ILO, Mr. Michel Hansenne, and his officers for their generous support and assistance in carrying out the Commission's mandate. They record their special gratitude to Mr. Th. Sidibé and his successor, Mr. Héctor Bartolomei, and to Mr. Bernard Gernigon for their invaluable help. The Commission records its particular thanks to its Secretariat which travelled with it to South Africa and laboured indefatigably both there and in Geneva. These outstanding officers should be acknowledged by name. Mrs. Hilary Kellerson (Head of Secretariat), Mr. Neville Rubin, Mrs. Jane Hodges, Ms. Deepa Rishikesh and Mrs. Nicole Tharin gave sterling service. The high desirability which the Commission attached to the early preparation of its report put enormous pressures on the Secretariat. Individually and collectively its members rose to the challenge, realising as the Commission itself did, the great importance of the project upon which all were involved. Mention should also be made of the unnamed typists and word processor operators who helped to produce the report under great pressure of time. Finally, the innumerable people of all races in South Africa who extended acts of kindness and assistance must be mentioned. Their land, of great beauty and resources - of people and material - inspires the hope of a better future founded in basic rights and freedoms, including those to which this report is dedicated.

W.D.
M.K.
R.L.

ANNEX I

LIST OF ORGANISATIONS FROM WHICH INFORMATION WAS REQUESTED

National employers' organisations

South African Employers' Consultative Committee on Labour Affairs (SACCOLA)

South African Council of Business (SACOB)

South African Agricultural Union (SAAU)

Afrikaansehandlesinstituut (AHI)

Consultative Business Movement (CBM)

Chamber of Mines (COM)

Steel and Engineering Industries Federation of South Africa (SEIFSA)

National African Federated Chambers of Commerce (NAFCOC)

Foundation of Black Consumers Associations (FABCOS)

National trade union organisations

National Council of Trade Unions (NACTU)

Federation of Independent Trade Unions (FITU)

South African Confederation of Labour (SACOL)

United Workers' Union of South Africa (UWUSA)

Federation of Salaried Staff Associations of South Africa (FEDSAL)

International organisations of employers and workers

International Organisation of Employers (IOE)

International Confederation of Free Trade Unions (ICFTU)

World Federation of Trade Unions (WFTU)

World Confederation of Labour (WCL)

Organisation of African Trade Union Unity (OATUU)

Pan African Employers' Confederation (PAEC)

ANNEX II

MINUTE OF A MEETING BETWEEN REPRESENTATIVES OF THE WORKING PARTY AND THE MINISTER OF MANPOWER HELD AT THE OFFICE OF THE MINISTER IN PRETORIA ON 13 AND 14 SEPTEMBER 1990 (THE "LABORIA MINUTE")

1. The working party established by the State President to find ways and means of restoring confidence between the Department of Manpower and the parties to the SACCOLA, COSATU, NACTU accord has formulated a number of proposals which it believes would have the effect of restoring such confidence and re-establishing sound relationships in future.

2. The working party notes the Government's commitment to sound relations between all employees and employers in South Africa and its endorsement in principle of the basic rights of employees and employers, including the freedom of association and collective bargaining, in all sectors of the national economy.

3. In view of the above the Government commits itself to address as a matter of priority the position of agricultural workers, domestic workers and state employees.

4. The NMC will therefore undertake an investigation into how those basic labour relations rights of farm and domestic workers can be given effect. It will consider inter alia the extension of those basic labour relations rights currently enjoyed by workers under the Labour Relations Act either by the extension of the Labour Relations Act or other suitable legal mechanisms. The NMC will report thereon by June 1991, whereafter a bill will be published for comment by all interested parties.

   4.1 The Minister will request the NMC to consider and recommend before the end of November 1990 the possible inclusion of the following clause, and if consistent with clauses 8 and 9 consensus has been obtained the Minister will endeavour to include it in the draft Bill referred to in clause 10 below:

   Section 2(2)(b): Notwithstanding the above, this Act shall apply to any undertaking that in the nature of its operations, is industrial in character.

5. SACCOLA, COSATU, NACTU undertake to explore with the South African Agricultural Union the extension of organisational rights to agricultural workers pending the implementation of any legislation promulgated in terms of the process referred to in paragraphs 3 and 4 above.

6. The working party notes the Government's commitment to establish, through a process of negotiation with representative bodies, which may include COSATU and NACTU, effective and mutually acceptable arrangements for labour relations in the State sector.

7. Prior to the implementation of basic rights to all employers and employees in the State sector, SACCOLA, COSATU and NACTU propose to the Commission of Administration that disputes concerning the exercise of organisational rights in the State sector be referred to third party adjudication.

8. The working party agrees that legislation on labour relations cannot work unless there has been extensive consultation with at least the major actors in the labour relations arena and broad consensus on the

legislative framework for the regulation of labour relations. In order to give effect to this principle, no future legislation on labour relations shall be put before Parliament unless considered by the NMC in a restructured form. Such restructuring shall ensure that the NMC is broadly representative of the major actors in the labour relations arena and to this end, COSATU and NACTU agree to participate in a restructured NMC after consultation with the Minister, the NMC and SACCOLA. In the interim, pending the admission of COSATU and NACTU to a restructured NMC, no future legislation on the Labour Relations Act 28 of 1956 or any statute that is intended to replace it, will be put before Parliament unless opportunity has been given to the major actors, including COSATU, NACTU, SACCOLA, the NMC and the public sector unions associations in so far as the public sector is concerned, to consider and comment thereon.

9. The working party agrees that all labour legislation should enjoy the confidence of all major actors in the labour relations arena. To this effect, the Department of Manpower agrees that future draft labour legislation shall be published for public comment prior to being put before Parliament. All representations made to the NMC in connection therewith shall be available to public scrutiny, in order that all interested parties shall be afforded the democratic opportunity to respond to such comment.

10. A draft Bill incorporating the COSATU, NACTU, SACCOLA accord as amended by the NMC's recommendations and the working party, shall be submitted before the end of September 1990 to Parliament for the Joint Committee's urgent consideration and recommendations in order that the Bill can be placed on the Parliamentary order paper during February 1991.

11. The Minister will instruct the NMC to publish for comment the proposals tabled during the working party's deliberations in respect of the Labour Appeal Court. After consideration of the comments submitted to it the NMC shall make such recommendations to the Minister as it shall deem fit. The NMC agrees to submit its recommendations by December 1990.

12. As the proposals concerning the Labour Appeal Court concern the Department of Justice and the judiciary, the Minister agrees to endeavour to arrange meetings between the working party and the Minister of Justice and to request the Minister of Justice to approach the judiciary to meet representatives of the working party on the proposals.

13. SACCOLA, COSATU, and NACTU agree, pending the legislative implementation of the CNS accord, to prevail on their affiliates and members of their affiliates to comply with the provisions of the CNS accord. In so doing, SACCOLA, COSATU and NACTU agree to take all reasonable steps available, including public statements, to have their affiliates and members of such affiliates specifically give effect to:

    13.1 the agreement not to rely on the presumption-provision of s79(2) in any court proceedings whether Industrial or Supreme Court;

    13.2 the provisions concerning the service and notice of interdicts as set out in the annexure to the CNS accord;

    13.3 the provisions concerning the time limits for the referral of disputes to industrial councils and the application for conciliation boards by not objecting to any non-compliance with any of the relevant sections provided only that the dispute is referred to the industrial council or the application for a conciliation board is made within the 180 day period set out in the CNS accord.

14. SACCOLA, COSATU and NACTU can rely on the provisions in paragraph 13 in any proceedings brought against them, their affiliates or individual members of those affiliates.

15. The Minister and the Department of Manpower undertake to circulate to all Regional Directors of the Department a statement of policy to the effect that in applications for the establishment of conciliation boards filed after 90 days but before 180 days from the date on which the dispute was first alleged to have arisen, the discretion to establish a conciliation board shall be exercised in favour of the applicant.

16. The parties are committed to dialogue and discussion to resolve conflict whenever it arises. To this end they will exhaust existing avenues and explore new ones with a view to avoiding, whenever possible, the resort to coercive measures and the disruption of the workplace.

17. To this end COSATU and NACTU agree not to call their planned stay-away to protest the State's failure to implement the CNS accord read with the National Manpower Commission's recommendations during the 1990 session of Parliament.

18. All of the parties record their willingness to discuss, in an appropriate forum, the impact of labour relations issues on the economy.

TO BE RECOMMENDED TO CABINET AS FAR AS IS APPLICABLE TO GOVERNMENT

(Signed)

MINISTER OF MANPOWER

TO BE RECOMMENDED TO THEIR MEMBERS AS FAR AS IS APPLICABLE TO THEM

(Signed)	(Signed)	(Signed)
FOR SACCOLA	FOR COSATU	FOR NACTU.

ANNEX III

SECOND SESSION PROGRAMME

February 1992

Friday, 7	Cape Town	a.m. -	Plenary meeting of members of the Commission to review written memoranda and practical details with the secretariat.
		3 p.m. -	Formal opening of Second Session of the Commission: Opening statement from COSATU.
Saturday, 8) Sunday, 9) Monday, 10)			Opening statement continued. Courtesy calls on representatives of the Government, judiciary and others. Statement continued. Hearing of first witness.
Tuesday, 11) Wednesday, 12) Thursday, 13)	East London/Durban/ Port Elizabeth		Members undertook individual visits.
Friday, 14	Johannesburg	a.m. -	Members reconvened for plenary discussion of the individual visits.
		p.m. -	Opening statement from the Government. Hearings of the witnesses.
Saturday, 15) Monday, 17) Tuesday, 18) Wednesday, 19) Thursday, 20)	Johannesburg		Hearings of the witnesses.
Friday, 21			Closing statements by the parties.

ANNEX IV

LIST OF WITNESSES WHO APPEARED BEFORE THE COMMISSION

1. Professor C.J.R. Dugard.
2. Mr. Jay Naidoo, General Secretary, COSATU.
3. Professor E. Webster.
4. Mr. M. Madlala, Assistant General Secretary, Food and Allied Workers' Union (FAWU).
5. Mr. P. Dladla, organiser, National Union of Metal Workers of South Africa (NUMSA).
6. Mr. Z.J. de Beer, leader of the Democratic Party, Chairman of the Convention for a Democratic South Africa (CODESA).
7. Professor N.E. Wiehahn.
8. Mr. J.J. Kleynhans, South African Agricultural Union (SAAU).
9. Mr. E. Patel, Assistant General Secretary, South African Clothing and Textile Workers' Union (SACTWU).
10. Mr. D. van der Walt, Director, Labour Relations, Department of Manpower.
11. Mr. D.W. James, Industrial Registrar.
12. Mr. C. Ramaphosa, Secretary-General, African National Congress (ANC) former Secretary-General, National Union of Mineworkers (NUM).
13. Dr. F.S. Barker, Chairman, National Manpower Commission (NMC) .
14. Professor A.A. Landman, member, NMC.
15. Mr. J.W. Botha, Chairman, South African Employers' Consultative Committee on Labour Affairs (SACCOLA) (representative of the South African Chamber of Business).
16. Mr. R.M. Godsell, SACCOLA (responsible for labour legislation, director of Anglo-American Corporation).
17. Mr. M.J. Golding, Assistant General Secretary, National Union of Mineworkers (NUM).
18. Ms. Violet Motlhasedi, South African Domestic Workers' Union (SADWU).
19. Mr. C.H.J. van Rensburg, Deputy General Manager, Public Service Association of South Africa (PSA).
20. Mr. C. Ngcukana, General Secretary, National Council of Trade Unions (NACTU).

21. Major-General C.M. van Niekerk, Commanding Officer, administrative services, South African Police.

22. Mr. D.R. Senagomo, National Public Relations Officer, United Workers' Union of South Africa (UWUSA).

ANNEX V

LIST OF DOCUMENTATION SUBMITTED TO THE COMMISSION

By COSATU

1. Further submissions dated 3 December 1991 with two volumes of supporting case law.
2. Written memoranda on strike jurisprudence and on security legislation.
3. Excerpt from "The New Labour Law" re criteria for strike dismissals.
4. Professor C.J.R. Dugard's written statement with annexes.
5. Mr. J. Naidoo's written statement with annexes.
6. Professor E. Webster's written statement.
7. Mr. M. Madlala's written statement with annexes.
8. Mr. P. Dladla's written statement with annexes.
9. Mr. E. Patel's written statement.
10. Documentation relating to Mr. C. Ramaphosa's evidence.
11. Mr. M.J. Golding's written statement with annexes.
12. Ms. V. Motlhasedi's written statement.
13. Mr. C.H.J. van Rensburg's written statement with annexes.
14. NACTU: Mr. C. Ngcukana's written statement.
15. Minute of Meeting with the Cabinet Committee on Manpower of Bophuthatswana on 12 December 1991.
16. Various documents relating to the oral evidence given by Mr. D.R. Senagomo of UWUSA.
17. Documents relating to oral evidence given by Dr. F.S. Barker of the NMC.
18. Dr. C. Thompson's notes dated 14 February 1992 on the Temporary Removal of Restrictions on Economic Activities Act with annexes (not received into evidence).
19. Basic Conditions of Employment Bills (150A and 150B).
20. Five volumes of statutes.
21. CODESA's declaration of intent.
22. COSATU publications relating to training materials for shop stewards.
23. Extract from "The Law of Persons and the Family" by P.Q.R Boberg.

By the Government

24. Government's written response to COSATU's further submissions.

25. Professor N.E. Wiehahn's written statement.

26. Mr. D. van der Walt's written statement.

27. Mr. D.W. James' written statement.

28. Dr. F.S. Barker's written statement with two sets of annexes.

29. Professor A.A. Landman's written statement.

30. Major-General C.M. van Niekerk's written statement and annexes.

31. List of cases evidencing court sentences.

32. Information gathered on COSATU's list of cases of violence.

33. Various Annual Reports of the Department of Manpower.

By SACCOLA

34. Written submission presented by Mr. J.W. Botha.

35. SAAU: Mr. J.J. Kleynhans' written statement with annexes.

36. Further written submissions transmitted on 8 April 1992.

ANNEX VI

LIST OF LEGISLATION REFERRED TO IN COSATU'S FURTHER SUBMISSIONS AND ARGUMENTS

1. Affected Organisations Act, 1974
2. Armaments Development and Production Act, 1968
3. Basic Conditions of Employment Act, 1983
4. Broadcasting Act, 1976
5. Coloured Persons Education Act, 1963
6. Criminal Procedure Act, 1977
7. Defence Act, 1957
8. Disclosure of Foreign Funding Act, 1989
9. Education Affairs Act, 1988
10. Education and Training Act, 1979
11. Fund Raising Act, 1978
12. Indian Education Act, 1965
13. Internal Security Act, 1982
14. Intimidation Act, 1982
15. Labour Relations Act, 1956, as amended
16. Machinery and Occupational Safety Act
17. Manpower Training Act
18. Medical, Dental + Supplementary Health Services Act, 1974
19. Mines and Works Act
20. National Education Policy Act, 1967
21. National States Constitution Act, 1971
22. Nursing Act, 1978
23. Police Act, 1958
24. Population Registration Act, 1991
25. Post Office Service Act, 1974
26. Prevention of Illegal Squatting Act, 1951
27. Prisons Act, 1959
28. Public Safety Act, 1953
29. Public Service Act, 1984
30. Publications Act, 1974
31. Radio Act, 1952
32. Trespass Act, 1959
33. Unemployment Insurance Act, 1966
34. Wage Act, 1957
35. Bophuthatswana Industrial Conciliation Act, 1984
36. " Industrial Relations Act, 1991 (not yet in force)
37. " Security Clearance Act
38. " Internal Security Act, 1979
39. " Labour Act, 1974
40. " Public Service Act
41. " Constitution Act, 1977
42. " Aliens and Travellers Control Act
43. " Indemnification Act, 1989
44. " Citizenship Act, 1978
45. " Official Secrets Act, 1956
46. Ciskei Labour Regulations Decree, No. 15 of 1990
47. Gazankulu Black Labour (Settlement of Disputes) Act, No. 48 of 1953 (as it was on 1 February 1973 when this was declared a self-governing territory) and the Industrial Conciliation Act, No. 28 of 1956 (as it was on 1 February 1973)
48. Kangwane Labour Relations Act, No. 28 of 1956 (as it was on 2 August 1984 when this was declared a self-governing territory, except that it does not apply to Black workers)
49. Kwa Ndebele Labour Relations Act, No. 19 of 1991

50. KwaZulu Labour Relations Act, No. 7 of 1985
51. Lebowa as for Gazankulu except for the relevant date of the self-government declaration, namely 2 October 1972
52. QwaQwa Labour Relations Act, No. 13 of 1988
53. Transkei Labour Relations Act, No. 12 of 1990
54. Venda Labour Relations Proclamation, No. 3 of 1991

ANNEX VII

DECLARATION OF INTENT ADOPTED BY CODESA AND THE AGREED TERMS OF REFERENCE FOR ITS WORKING GROUPS

We, the duly authorized representatives of political parties, political organisations, administrations and the South African Government, coming together at this first meeting of the Convention for a Democratic South Africa, mindful of the awesome responsibility that rests on us at this moment in the history of our country,

declare our solemn commitment:

1. to bring about an undivided South Africa with one nation sharing a common citizenship, patriotism and loyalty, pursuing amidst our diversity, freedom, equality and security for all irrespective of race, colour, sex or creed; a country free from apartheid or any other form of discrimination or domination;

2. to work to heal the divisions of the past, to secure the advancement of all, and to establish a free and open society based on democratic values where the dignity, worth and rights of every South African are protected by law;

3. to strive to improve the quality of life of our people through policies that will promote economic growth and human development and ensure equal opportunities and social justice for all South Africans;

4. to create a climate conducive to peaceful constitutional change by eliminating violence, intimidation and destabilisation and by promoting free political participation, discussion and debate;

5. to set in motion the process of drawing up and establishing a constitution that will ensure, *inter alia*:

    (a) that South Africa will be a united, democratic, non-racial and non-sexist state in which sovereign authority is exercised over the whole of its territory;

    (b) that the Constitution will be the supreme law and that it will be guarded over by an independent, non-racial and impartial judiciary;

    (c) that there will be a multi-party democracy with the right to form and join political parties and with regular elections on the basis of universal adult suffrage on a common voters roll; in general the basic electoral system shall be that of proportional representation;

    (d) that there shall be a separation of powers between the legislature, executive and judiciary with appropriate checks and balances;

    (e) that the diversity of languages, cultures and religions of the people of South Africa shall be acknowledged;

    (f) that all shall enjoy universally accepted human rights, freedoms and civil liberties including freedom of religion, speech and assembly protected by an entrenched and justifiable Bill of Rights and a legal system that guarantees equality of all before the law.

We agree:

1. that the present and future participants shall be entitled to put forward freely to the Convention any proposal consistent with democracy;

2. that CODESA will establish a mechanism whose task it will be, in cooperation with administrations and the South African Government, to draft the texts of all legislation required to give effect to the agreements reached in CODESA.

We, the representatives of political parties, political organisations and administrations, further solemnly commit ourselves to be bound by the agreement of CODESA and in good faith to take all such steps as are within our power and authority to realise their implementation.

Signed by representatives of: African National Congress; Ciskei Government; Democratic Party; Dikwankwetla Party; Inyandza National Movement; Intando Yesizwe Party; Labour Party of South Africa; Natal/Transvaal Indian Congress; National Party; National People's Party; Solidarity; South African Communist Party; Transkei Government; United People's Front; Venda Government; and Ximoko Progressive Party. [Not signed by Bophuthatswana Government or the Inkatha Freedom Party.]

We, the South African Government, declare ourselves to be bound by agreements we reach together with other participants in CODESA in accordance with the standing rules and hereby commit ourselves to the implementation thereof within our capacity, powers and authority.

Signed by F.W. de Klerk on behalf of the South African Government.

AGREED TERMS OF REFERENCE FOR WORKING GROUPS FOR CODESA

WORKING GROUP 1

1. FIRST ASSIGNMENT

Creation of a climate for free political participation.

1.1 Terms of Reference

WHEREAS the parties at Codesa have committed themselves to the terms and objectives set out in the Declaration of Intent as amended from time to time

AND WHEREAS it has been nationally and internationally recognised that a climate for free political participation is an essential element of the transitional phase towards and in a democratic South Africa

AND WHEREAS democracy requires that all the participants in the political process should be free to participate in that process without fear and on an equal footing and on a basis of equality with the other participants

IT IS RECORDED that the terms of reference of the working group on the creation of a climate for free political participation shall be as follows:

1.1.1 To investigate and report upon all proposals and make recommendations with regard to the actions needed to be taken to foster and establish in South Africa a climate in which all individuals and organisations can participate freely, without interference or intimidation, in all political activity and, in particular, in the processes leading up to the introduction of a new constitution

1.1.2 To identify the key issues and problems that need to be addressed.

1.1.3 To identify areas of commonality and aspects where agreement already exists between participating delegations.

1.1.4 Specifically, but without vitiating the generality of the above, to consider whether and how the following issues should be addressed:

(a) the finalisation of matters relating to the release of political prisoners and political trials;

(b) the return of exiles and their families;

(c) the amendment and/or repeal of any remaining laws militating against free political activity, including the elimination of all discriminatory legislation;

(d) political intimidation;

(e) the termination of the use of military and/or violent means or the threat thereof of promoting the objectives/views of a political party or organisation;

(f) political neutrality of, and fair access to, state-controlled/statutorily instituted media (particularly the SABC and SATV), including those of the TBVC states;

(g) the successful implementation of the National Peace Accord;

(h) the prevention of violence-related crime and matters giving rise thereto;

(i) the composition and role of the security forces in South Africa and the TBVC states;

(j) the funding of political parties;

(k) the fair access to public facilities and meeting venues;

(l) the advisability of statutory provisions guaranteeing equal opportunity for all parties to establish and maintain their own means of mass communication;

(m) the need for an improvement in socio-economic conditions;

(n) the fostering of a spirit of tolerance amongst political parties;

(o) the role of intensive and continuous educative and informative campaigns in respect of political tolerance, the working of democracy and the processes of Codesa;

(p) the advisability of fair and reasonable access for political parties to all potential voters, wherever they may reside;

(q) any other matters which the working group may consider relevant to its brief.

2. SECOND ASSIGNMENT

Role of international community.

2.1 Terms of Reference

WHEREAS the parties at Codesa have committed themselves to the terms and objectives set out in the Declaration of Intent

AND WHEREAS the validity and acceptability of the process of transition and the outcome thereof internally and internationally, will depend on an open and fair process providing for full and effective participation of all South Africans

IT IS RECORDED that the working group on the role of the international community shall have the following terms of reference:

2.1.1 To investigate, consider and report upon all proposals and make recommendations with regard to the role that the international community and/or organisations could be asked to play in the formal or informal processes involved in the period leading up to the introduction of a new constitution for South Africa.

2.1.2 To identify the key issues and problems that need to be addressed.

2.1.3 To identify areas of commonality and aspects where agreement already exists between participating delegations.

WORKING GROUP 2

1. FIRST ASSIGNMENT

General constitutional principles.

1.1 Terms of Reference

WHEREAS the parties at Codesa have committed themselves to the terms and objectives set out in the Declaration of Intent as amended from time to time

IT IS RECORDED that the working group on general constitutional principles shall have the following terms of reference:

1.1.1 To investigate and report upon all proposals and make recommendations with regard to general constitutional principles which should be enshrined in and not contradicted by any other provisions of a new constitution, provided that the present and future participants of Codesa shall be entitled to put forward freely to this working Group any proposal or matter consistent with democracy for discussion, consideration and recommendation.

1.1.2 To identify the key issues and problems that need to be addressed.

1.1.3 To identify areas of commonality and aspects where agreement already exists between participating delegations.

2. SECOND ASSIGNMENT

Constitution-making body/process.

2.1 Terms of Reference

WHEREAS the parties at Codesa have committed themselves to the terms and objectives set out in the Declaration of Intent as amended from time to time to the establishment of a democratic South Africa enjoying internal legitimacy and international acceptance

AND WHEREAS it has been agreed that a working group on the constitution-making body/process shall be appointed by Codesa in order to formulate proposals and make recommendations on the appropriate body/process to draft a new constitution for South Africa

IT IS RECORDED that the working group on a constitution-making body/process shall have the following terms of reference:

2.1.1 To investigate and report upon all proposals and make recommendations with regard to an appropriate constitution-making body/process.

In respect of both the constitution-making process and body:

2.1.2 To identify the key issues and problems that need to be addressed.

2.1.3 To identify areas of commonality and aspects where agreement already exists between participating delegations.

2.1.4 In respect of a constitution-making process:

Specifically, but without vitiating the generality of the objective, to consider:

(a) to make recommendations to Codesa regarding the process through which a new constitution may be formulated;

(b) how far the process can be taken by Codesa itself;

(c) at what stage a special constitution-making body, if any, should be constituted;

(d) the role of referenda, if any, in the constitution-making process;

(e) legislative and administrative steps that may be required to reinforce the constitution-making process;

(f) the method of transferring constitutional authority to the new constitution and its structures at national, regional and local level;

(g) any other matters which the working group may consider relevant to its brief.

2.1.5 In respect of constitution-making body:

In the event of it being recommended that there be a special constitution-making body, then specifically, but without vitiating the generality of paragraph 2.1.1, is to be considered:

(a) its composition;

(b) its legal status;

(c) its authority including limitations e.g. principles, procedures, etc. that may have been agreed previously;

(d) its method of functioning;

(e) the status of its decisions;

(f) should it be an elected body, the appropriate electoral process;

(g) any other matter which the working group may consider relevant to its brief.

WORKING GROUP 3

ASSIGNMENT

Transitional arrangements/interim government/transitional authority.

1. Terms of Reference

WHEREAS the parties at Codesa have committed themselves in the terms set out in the Declaration of Intent as amended from time to time

AND WHEREAS it has been agreed that a working group of Codesa should be appointed to consider the issue of interim government/transitional arrangements/transitional authority

IT IS RECORDED that the working group on transitional arrangements/interim government/transitional authority shall have the following terms of reference:

1.1 To investigate, canvass all possibilities and their application and report upon all proposals and make recommendations with regard to the manner in which the country may be governed and managed until the introduction of a new constitution.

1.2 To identify the key issues, processes and problems that need to be addressed.

1.3 To identify areas of commonality and aspects where agreement already exists between participating delegations.

WORKING GROUP 4

ASSIGNMENT

Future of TBVC states.

1. Terms of Reference

WHEREAS the parties at Codesa have committed themselves in the terms set out in the Declaration of Intent as amended from time to time

AND WHEREAS the parties recognise the need to provide for the meaningful and democratic participation of all the people living in the TBVC states in the process of drawing up and adopting a new constitution for South Africa as well as in all possible transitional arrangements

AND WHEREAS the reality of the current existence of a number of separate but parallel institutions such as different administrations, civil services, armed forces, police forces and judiciaries as well as differing laws in certain instances which presently exist in South Africa, and the TBVC states; calls for a re-evaluation of this situation

AND WHEREAS in the event of reincorporation the need to ensure that the lives and livelihoods of people in the affected territories shall not be subjected to any unnecessary disruption

IT IS RECORDED that the terms of reference of the working group on the future reincorporation of the TBVC states are as follows:

1.1.1 To investigate and report upon all proposals and make recommendations with regard to the relationships between South Africa, the TBVC states and the people of those states under a new South African constitution.

1.1.2 To identify the key issues and problems that need to be addressed.

1.1.3 To identify areas of commonality and aspects where agreement already exists between participating delegations.

1.1.4 Specifically, but without vitiating the generality of the above to consider whether and how:

(a) to make recommendations to Codesa regarding the manner in which the constitutional status of the TBVC states may be affected by the outcome of negotiations within the framework of Codesa;

(b) the desirability or otherwise of the reincorporation of such states;

(c) testing the will of the people concerned regarding reincorporation or otherwise, of the TBVC states, by acceptable democratic means;

(d) strategies to keep the people of the TBVC states fully informed, especially to avoid unfortunate misunderstandings;

(e) the retention of business confidence, particularly in relation to existing investments in the TBVC states;

(f) land transfers by South Africa to these states;

(g) citizenship;

(h) any other matters which the working group may consider relevant to its brief.

1.1.5 If reincorporation is decided upon in respect of any TBVC state, matters that will need to be addressed include:

(a) proposals for the reincorporation into South Africa of a TBVC state;

(b) consider the question of transitional arrangements in those states which want to be incorporated;

(c) the time frames for such a reincorporation and related processes;

(d) disposal/transfer of assets of TBVC governments;

(e) optimal use of existing infrastructure;

(f) review of development project priorities;

(g) good administration transition;

(h) the formulation of appropriate measures and steps to be taken to ensure that in the process of reincorporation of a TBVC state, interruption or disruption in administration and the rendering of services and in the daily lives of people in the affected areas are reduced to an absolute minimum;

(i) consider future of civil service in such states;

(j) the exact form of authority in the TBVC territories;

(k) harmonisation of legislation and taxation;

(l) orderly termination of bilateral and multilateral agreements and treaties;

(m) servicing and repayment of TBVC state debts;

(n) ensuring public accountability of actions taken for the purposes of reincorporation;

(o) the identification of specific constitutional, legal and political measures and steps which will have to be taken to effect reincorporation.

WORKING GROUP 5

ASSIGNMENT

Time frames and implementation of Codesa's agreements.

1. Terms of Reference

WHEREAS the parties at Codesa have committed themselves in the terms set out in the Declaration of Intent as amended from time to time

AND WHEREAS it is necessary to record agreements which are reached at Codesa and to implement such agreements and, accordingly, to prepare in draft form the documentation which is required for effect to be given to such agreements

AND WHEREAS it has been agreed that a working group on the implementation of agreements/decisions shall be appointed by Codesa to identify the steps which need to be taken by the parties to Codesa

AND WHEREAS it is desirable to advise on the possible time frames and target dates

IT IS RECORDED that the terms of reference of the working group on time frames and the implementation of Codesa's agreements/decisions are as follows:

1.1.1 To investigate and report upon all proposals and make recommendations with regard to appropriate time frames and target completion dates for all of the processes and assignments being undertaken by Codesa, its working groups and other bodies created as a result of agreements/decisions of Codesa.

1.1.2 To identify the key issues and problems that need to be addressed.

1.1.3 To identify areas of commonality and aspects where agreement already exists between participating delegations.

1.1.4 Specifically, but without vitiating the generality of the above, consider whether and how to address:

(a) the need for a regularly updated comprehensive list of all the decisions, actions and processes involved;

(b) the coordination of the activities of Codesa and its subsidiary bodies to ensure the greatest possible efficiency of the process towards a democratic South Africa;

(c) the practicability of setting of target completion dates for all agreements/activities/decisions;

(d) the monitoring of the process and the adjustment of targets whenever necessary;

(e) the dissemination of up-to-date information in respect of progress made to all Codesa participants, interested parties and authorities;

(f) to address the identification of legislation that needs to be enacted or amended;

(g) to assist in formulating the terms of the legislation or amendments;

(h) realistically attainable time frames;

(i) practical effect of implementation of agreements;

(j) the legality of the process in relation to time frames to be negotiated within the context of constitutional continuity;

(k) any other matters which the working group may consider relevant to its brief.

ANNEX VIII

EXTRACTS OF ILO INSTRUMENTS ON FREEDOM OF ASSOCIATION

1. The Declaration of Philadelphia

The General Conference of the International Labour Organisation, meeting in its Twenty-sixth Session in Philadelphia, hereby adopts, this tenth day of May in the year nineteen hundred and forty-four, the present Declaration of the aims and purposes of the International Labour Organisation and of the principles which should inspire the policy of its Members.

I

The Conference reaffirms the fundamental principles on which the Organisation is based and, in particular that -

(a) labour is not a commodity;

(b) freedom of expression and of association are essential to sustained progress;

(c) poverty anywhere constitutes a danger to prosperity everywhere;

(d) the war against want requires to be carried on with unrelenting vigour within each nation, and by continuous and concerted international effort in which the representatives of workers and employers, enjoying equal status with those of governments, join with them in free discussion and democratic decision with a view to the promotion of the common welfare.

II

Believing that experience has fully demonstrated the truth of the statement in the Constitution of the International Labour Organisation that lasting peace can be established only if based on social justice, the Conference affirms that -

(a) all human beings, irrespective of race, creed or sex, have the right to pursue both their material well-being and their spiritual development in conditions of freedom and dignity, of economic security and equal opportunity;

(b) the attainment of the conditions in which this shall be possible must constitute the central aim of national and international policy;

[...]

III

The Conference recognises the solemn obligation of the International Labour Organisation to further among the nations of the world programmes which will achieve:

(a) full employment and the raising of standards of living;

(b) the employment of workers in the occupation in which they can have the satisfaction of giving the fullest measure of their skill and attainment and make their contribution to the common well-being;

(c) the provision, as a means to the attainment of this end and under adequate guarantees for all concerned, of facilities for training and the transfer of labour, including migration for employment and settlement;

(d) policies in regard to wages and earnings, hours and other conditions of work calculated to ensure a just share of the fruits of progress to all, and a minimum living wage to all employed and in need of such protection;

(e) the effective recognition of the right of collective bargaining, to co-operation of management and labour in the continuous improvement of productive efficiency, and the collaboration of workers and employers in the preparation and application of social and economic measures;

(f) the extension of social security measures to provide a basic income to all in need of such protection and comprehensive medical care;

(g) adequate protection for the life and health of workers in all occupations;

(h) provision for child welfare and maternity protection;

(i) the provision of adequate nutrition, housing and facilities for recreation and culture;

(j) the assurance of equality of educational and vocational opportunity.

2. Convention concerning Freedom of Association and Protection of the Right to Organise Convention, 1984 (No. 87)

Article 2

Workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organisation concerned, to join organisations of their own choosing without previous authorisation.

Article 3

1. Workers' and employers' organisations shall have the right to draw up their constitutions and rules, to elect their representatives in full freedom, to organise their administration and activities and to formulate their programmes.

2. The public authorities shall refrain from any interference which would restrict this right or impede the lawful exercise thereof.

Article 4

Workers' and employers' organisations shall not be liable to be dissolved or suspended by administrative authority.

Article 5

Workers' and employers' organisations shall have the right to establish and join federations and confederations and any such organisation, federation or confederation shall have the right to affiliate with international organisations of workers and employers.

Article 6

The provisions of Articles 2, 3 and 4 hereof apply to federations and confederations of workers' and employers' organisations.

Article 7

The acquisition of legal personality by workers' and employers' organisations, federations and confederations shall not be made subject to conditions of such a character as to restrict the application of the provisions of Articles 2, 3 and 4 hereof.

Article 8

1. In exercising the rights provided for in this Convention workers and employers and their respective organisations, like other persons or organised collectivities, shall respect the law of the land.

2. The law of the land shall not be such as to impair, nor shall it be so applied as to impair, the guarantees provided for in this Convention.

Article 9

1. The extent to which the guarantees provided for in this Convention shall apply to the armed forces and the police shall be determined by national laws or regulations.

2. In accordance with the principle set forth in paragraph 8 of article 19 of the Constitution of the International Labour Organisation the ratification of this Convention by any Member shall not be deemed to affect any existing law, award, custom or agreement in virtue of which members of the armed forces or the police enjoy any right guaranteed by this Convention.

Article 10

In this Convention the term "organisation" means any organisation of workers or of employers for furthering and defending the interests of workers or of employers.

Article 11

Each Member of the International Labour Organisation for which this Convention is in force undertakes to take all necessary and appropriate measures to ensure that workers and employers may exercise freely the right to organise.

3. Right to Organise and Collective Bargaining Convention, 1949 (No. 98)

Article 1

1. Workers shall enjoy adquate protection against acts of anti-union discrimination in respect of their employment.

2. Such protection shall apply more particularly in respect of acts calculated to-

(a) make the employment of a worker subject to the condition that he shall not join a union or shall relinquish trade union membership;

(b) cause the dismissal of or otherwise prejudice a worker by reason of union membership or because of participation in union activities outside working hours or, with the consent of the employer, within working hours.

Article 2

1. Workers' and employers' organisations shall enjoy adequate protection against any acts of interference by each other or each other's agents or members in their establishment, functioning or administration.

2. In particular, acts which are designed to promote the establishment of workers' organisations under the domination of employers' organisations, or to support workers' organisations by financial or other means, with the object of placing such organisations under the control of employers or employers' organisations, shall be deemed to constitute acts of interference within the meaning of this Article.

Article 3

Machinery appropriate to national conditions shall be established, where necessary, for the purpose of ensuring respect for the right to organise as defined in the preceding Articles.

Article 4

Measures appropriate to national conditions shall be taken, where necessary, to encourage and promote the full development and utilisation of machinery for voluntary negotiation between employers or employers' organisations and workers' organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements.

Article 5

1. The extent to which the guarantees provided for in this Convention shall apply to the armed forces and the police shall be determined by national laws or regulations.

2. In accordance with the principle set forth in paragraph 8 of article 19 of the Constitution of the International Labour Organisation the ratification of this Convention by any Member shall not be deemed to affect

any existing law, award, custom or agreement in virtue of which members of the armed forces or the police enjoy any right guaranteed by this Convention.

Article 6

This Convention does not deal with the position of public servants engaged in the administration of the State, nor shall it be construed as prejudicing their rights or status in any way.

INTERNATIONAL LABOUR OFFICE
BUREAU INTERNATIONAL DU TRAVAIL
OFICINA INTERNACIONAL DEL TRABAJO

GOVERNING BODY
CONSEIL D'ADMINISTRATION
CONSEJO DE ADMINISTRACION

GB.253/15/7 Add.
253rd Session

Geneva,
May-June 1992

Fifteenth item on the agenda

REPORT OF THE DIRECTOR-GENERAL

First Supplementary Report

Report of the Fact-Finding and Conciliation Commission on Freedom of Association concerning the Republic of South Africa

Addendum

Comments of the Government of South Africa

Appended to this paper are the comments of the Government of South Africa on the Report of the Fact-Finding and Conciliation Commission on Freedom of Association appointed by the Governing Body to examine the complaint of infringements of trade union rights in the Republic of South Africa, presented to the ILO by the Congress of South African Trade Unions in a communication dated 11 May 1988.

Geneva, 25 May 1992.

RESPONSE OF THE GOVERNMENT OF SOUTH AFRICA TO THE REPORT OF THE FACT-FINDING AND CONCILIATION COMMISSION ON FREEDOM OF ASSOCIATION CONCERNING THE REPUBLIC OF SOUTH AFRICA

Pretoria, 15 May 1992

1. In recording its appreciation of the efforts of the Fact-Finding and Conciliation Commission and its secretariat to perform its duties in terms of the declaration made by the commissioners at the First Session and to produce an impartial report, the Government of South Africa hereby requests that this response be placed on record as part of the report of the Commission (see paragraph 55 of the report).

2. The Government's attitude regarding labour relations in South Africa is correctly summarised by the Commission in paragraph 747:

> The evidence and arguments adduced in the course of the proceedings made it clear that the Government is aware of the need for reform in the trade union and labour relations field. This provides a hopeful framework within which the various issues and problems identified in the Commission's report can be addressed.

3. The first paragraph of the report and frequently thereafter it is stated that South Africa is in the throes of dramatic change, involving the abandonment of the policy of apartheid which so profoundly affected South African law and society in particular over the past 40 years.

4. The evidence heard by the Commission confirmed beyond doubt that the labour situation in South Africa is neither simple and straightforward nor susceptible to simple solutions. However, there is a strong element of goodwill between employers, labour and Government and it is submitted that at the end of the day consensus which is both fair and equitable to all will be reached.

5. In considering the report of the Commission the following should be borne in mind:

5.1 South Africa is in essence a developing country. South Africa experiences a massive need for broadly based and sustained economic development to address problems such as high unemployment, illiteracy and the like.

5.2 Between 2.5 and 3 million people who wish to work are not involved in any type of economic activity. The high unemployment rate can be ascribed, firstly, to a very high population growth rate (in the region of 2.68 per cent per annum). Secondly, South Africa experienced a low economic growth rate, which amounted to no more than 1 per cent per annum, in the period 1981-90.

5.3 Since 1970 there has been a move towards capital-intensive instead of labour-intensive industry. This move is illustrated by the fact that in 1970 there were 57 units of capital employed for each unit of production, whereas in 1990 there were 105 units of capital for each unit of production. The consequence of this is that increasingly less labour is being employed to produce goods while increasingly more capital is being invested in such production.

5.4 Approximately 400,000 people enter the labour market annually, of which only 50,000 find employment. The result is a growth in unemployment of 350,000 per annum.

6. The Government has a primary duty of ensuring that all new labour legislation coincides with public interest. In the present day South Africa's public interest demands that as many workers as possible must be gainfully employed. The only way in which this can be achieved is by employers creating more jobs and offering these to the workforce. Any change to present legislation, or any new legislation, must take this into account. If this is not done, the labour problems which now face this country could only be exacerbated.

7. There is a great deal of violence and unlawfulness in South African society and this is illustrated by the statistics provided by the police and as reflected in the report.

The Government wants to place on record again its total aversion to violence irrespective of its nature or source. The Goldstone Commission headed by Mr. Justice Goldstone, a member of the Appellate Division of the Supreme Court of South Africa, indicates that much of the violence in a town like Alexandra, for example, has its origin in people opposing one another for the first time in the political arena. To quell the violence the cooperation of all leaders, including the trade union leadership, is necessary.

Reference is made in the report to attacks on trade unionists and violations of trade union premises. A police investigation into certain acts of sabotage led to the arrest on 29 April 1992 of, inter alia, a right-wing member of Parliament, who confessed to placing a bomb which damaged the office of COSATU in Pretoria during December 1991.

In a statement issued by the Minister of Law and Order on 5 March 1992, drastic measures to curb violence were announced, including more visible policing and the introduction of a highly mobile special task force.

In terms of the National Peace Accord a Police Board has been established. Professor N.R.L. Haysom was appointed to the Board. Professor Haysom is an adviser to CODESA and he is also a prominent human rights lawyer of the legal firm Cheadle, Thompson and Haysom which represented COSATU at the hearings.

Resulting from the findings of the Harms Commission certain guidelines in respect of covert organisations have been implemented and those were the forerunners of subsequent governmental control measures.

8. Since February 1990 the various security laws, although still in existence have, with rare exceptions, not been implemented by the Government, pending the outcome of a full-scale review of that legislation within the framework of CODESA.

9. Both the CODESA Declaration of Intent (attached to the report) and the South African Law Commission's proposed Bill of Rights espouse the following aims:

9.1 equality before the law;

9.2 the right of each citizen to be entitled to join the political party of his or her choice; and

9.3 the right of all citizens to enjoy universally accepted human rights, freedoms and civil liberties including freedom of religion, speech and assembly and that this be protected by an entrenched and justiciable bill of rights.

10. The CODESA Declaration of Intent has been signed by the vast majority of the main actors on the South African political scene.

11. In view of the rapid changes South Africa is undergoing, the present Labour Relations Act is recognised as being inadequate for South Africa's needs and must be updated.

12. The Minister of Manpower of the Republic of South Africa said in Parliament on 7 May 1992:

> When considering new legislation it is important to highlight two principles on the basis of which legislation in the manpower field is dealt with.
>
> The principles are contained in the so-called Laboria Minute. That Minute was noted during a meeting my predecessor had with SACCOLA, COSATU and NACTU on 13 and 14 September 1990. During the meeting inter alia the following principles were confirmed:
>
> The working party agrees that legislation on labour relations cannot work unless there has been extensive consultation with at least the major actors in the labour relations arena and broad consensus on the legislative framework for the regulation of labour relations.
>
> The working party agrees that all labour legislation should enjoy the confidence of all major actors in the labour relations arena.
>
> Labour legislation therefore rests on consensus between employers, employees and the State.

13. The rights of domestic servants, farm workers and civil servants must be protected by legislative enactment and steps have been taken to draft suitable legislation. This is an ongoing process.

14. The National Manpower Commission is not functioning properly, mainly because there is at present no consensus as to what its composition and role should be. Either a new NMC must be formed or an alternative body acceptable to employees, employers and the Government must be established.

15. Throughout the hearings the Government emphasised the spirit of reform prevailing in South Africa and the actual reforms taking place. It repeatedly stated that it regarded any debate on past events as being of secondary importance and not contributing to the present developments within the country.

16. As indicated in the 1988 submission to the ILO, the original complaint by COSATU addressed two main issues, namely:

(a) the alleged preference that the South African Government seeks to give to racially constituted unions at the expense of non-racial unions, as is more fully set out in the memorandum annexed to COSATU's letter dated 11 May 1988; and

(b) the alleged abridgement of the right to strike, as also set out in the said memorandum.

17. It is gratifying to note that the Commission found that this complaint has been satisfactorily addressed by amendments effected to the LRA in 1991. The following flows from this finding:

17.1 The principles set out in paragraph 12 above can lead to internationally acceptable legislation.

17.2 The Government's view that internal procedures should be exhausted before use is made of outside assistance, proved to be correct, but nevertheless, it agreed to receive the Commission and to amend its mandate in order to demonstrate its willingness to entertain objective expert opinion.

18. As stated above, the Government is continuing with its programme of labour legislation reform. Since the visit of the Commission to South Africa, the following developments have taken place:

18.1 Restructuring of the NMC

The Minister of Manpower had various discussions with interested parties on the restructuring of the NMC. A draft proposal for an economic forum was submitted to the Government. The relationship between such a forum and the NMC is now also being discussed.

A meeting of all the parties has been scheduled for 2 June 1992 to discuss either a new NMC or an alternative body acceptable to all interested parties.

18.2 Farm workers

Two rounds of discussions between the Minister of Manpower and representatives of COSATU, NACTU and the South African Agricultural Union have taken place since the Commission's visit. A working committee was established to investigate ways and means of reaching consensus regarding the extension of the LRA to agricultural workers and/or the advisability of adopting a single act for agriculture, incorporating provisions of the LRA, the Basic Conditions of Employment Act and also possibly the Wage Act. Further discussions took place on 7 May 1992 and will continue.

In the meantime the SAAU has indicated that it has no objection to the extension of the Unemployment Insurance Act to include agriculture.

18.3 Domestic workers

The NMC's recommendations regarding the extension of labour legislation to domestic workers were published for general information and comment.

Voluminous and divergent comment on the recommendations was received.

Investigations regarding the practical feasibility of the recommendations are currently under way.

Discussions between the Department of Manpower and a legal adviser of COSATU took place on 13 May 1992 in order to find interim ways of extending basic conditions of employment to domestic workers.

19. The registration of trade unions in terms of the LRA is one of the issues addressed in the 1991 amendments to the Labour Relations Act.

These amendments were based on the agreement between SACCOLA, COSATU and NACTU (the CNS-accord referred to in the report). In the interest of consensus on labour matters, the Government decided to table the agreement in Parliament with as few amendments as possible, even though the Government was aware that certain problems were not fully addressed in the agreement.

One of the amendments dealt with the registration of trade unions, in regard to which the parties suggested the deletion of section 4(4)(c) of the Labour Relations Act. The Department of Manpower brought it to the attention of the NMC that this amendment would not remove the relevant racial implication. It was proposed by the Department that it should be explicitly provided that race should not be considered as an interest for the purpose of registration.

This aforegoing proposal was however not acceptable, as SACCOLA, NACTU and COSATU had not agreed thereto in terms of the CNS-accord.

The Government hereby again endorses the approach that race as such should not constitute a separate industrial interest for the purposes of registration of a trade union.

It is therefore the Government's approach that the registration process of labour organisations should, as far as possible, be brought into line with internationally recognised principles of freedom of association.

To this end, it is the Government's intention to amend the provisions relating to registration. It is however felt that this should not be done in isolation, but that it should rather be addressed in the new Labour Relations Act, at present being drafted.

20. In a speech in Parliament on 7 May 1992, when the budget of the Department of Manpower was debated, the Minister referred to the following:

20.1 Freedom of association

The Government subscribes to the principles of freedom of association and is of the opinion that the following should inter alia be included in the LRA:

> An employee may take part fully in the formation of a trade union or similar association or a federation; can by choice become a member of a trade union, association or federation, take part in its lawful activities and become an office-bearer; can elect not to become a member of such body and exercise his right to disassociate; and is by law protected from any requirement by an employer that he shall not join a trade union or similar body.

20.2 Victimisation

The Government regards victimisation in a very serious light. It has always provided separately in the various labour Acts for protection against victimisation and for the institution of criminal proceedings in cases of contraventions.

Victimisation could also constitute an unfair labour practice.

20.3 Non-discrimination

The Government's viewpoint is that there should be no discrimination in employment, whether it be on the basis of race, colour, sex, religion or social origin.

The Government's policy that there should be equality of opportunity and treatment in employment is fully endorsed. However, distinction, exclusion or preference in respect of a particular job, based on the inherent requirements of the job, should not constitute discrimination.

Discrimination can constitute an unfair labour practice.

20.4 Occupational safety

One of the major shortcomings in the current legislation is the inadequate provision for the protection of the health of employees. Government has now accepted in principle that the protection of safety and health should be combined in one Act and it is envisaged that legislation providing for this will be tabled during the next Parliamentary session.

Other important principles which will be addressed are:

- The right of employees to be informed regarding their rights and to be better trained in the handling of danger.
- The current one-sided appointment of safety representatives in the workplace has various shortcomings. Consequently a system of elected representation on safety committees is to be proposed.

The draft Bill on Occupational Safety and Health, 1993 was published in the Government Gazette on 11 May 1992 for comment.

20.5 Dispute settlement

The LRA is an enabling Act which can be voluntarily resorted to, except in the case where a party requires the protection of the Act in respect of legitimate strikes and lockouts.

Consideration is being given to legalising strikes and lockouts under certain circumstances should parties use agreed-to private dispute solution or mediation channels not provided for in the LRA.

Investigations are also taking place to simplify the settlement of dispute procedures.

As a result of the number of individuals who are involved in dismissal cases consideration is being given to a special labour court to consider cases where no principles are involved.

At present, a draft Bill on the Labour Appeal Court is being circulated for comment.

21. Because South Africa has not been a Member of the International Labour Organisation since 1964, it is not au fait with the interpretation of all the Conventions, Recommendations and rules laid down by the various supervisory bodies of the ILO and the status of those rules. Despite its limited knowledge of the functions of the ILO and its instruments the Minister

of Manpower in a communication to the ILO stated that the Government of South Africa associates itself with the aims of the Convention concerning freedom of association.

22. Where jurisprudence has been developed in an organisation like the ILO over a period of 70 years and a country has been excluded from that process for the last 30 years of development, it must rely on its own knowledge, know-how and expertise in respect of such jurisprudence. The position was clearly underlined by the fact that copies of the relevant documentation of the ILO on freedom of association were distributed to the Government during the hearings by the Commission.

23. The South African Government has informally and in certain instances formally during the last two years, approached the ILO through the Office of the Director-General for technical assistance to expand its understanding of the various Conventions, Recommendations and other documentation of the ILO. To date the Government has not officially received that assistance. It is therefore noted with much appreciation that the Commission recommends in respect of the restructuring of the labour court system, that technical assistance should be given to the South African Government by the Office of the Director-General of the ILO. It is trusted that the ILO will comply with this recommendation and that technical assistance and advice to the South African Government, labour and management organisations, when requested, will be granted.

24. Mainly for the reasons set out in paragraphs 21-23 above, the Government has reservations regarding certain paragraphs of the report. These reservations must in no way be seen as criticisms of the Commission, which faced a virtually impossible task to deal within three weeks with such complex and wide-ranging problems.

25. The report contains various inaccuracies and misperceptions, some more serious than others. However, taking the report as a whole, the Government does not consider it necessary to expand on each of them. It is the opinion of the Government that these aspects can be dealt with, if necessary, in later discussions and deliberations in South Africa.

26. According to paragraph 3 of the report, the functions of the Commission were "to examine such cases of alleged infringements ... and to discuss the situation with the Government concerned with a view to securing the adjustment of difficulties by agreement; and thereafter to report to the Governing Body".

When the Government agreed to the expanded mandate it stressed the deliberation (conciliation) facet of the Commission's visit to South Africa.

The Government was under the impression that the fact-finding and conciliation phases would take place separately. The Government did not know that the panel had decided to integrate the two phases as it is apparently entitled to do. When informed of this fact the Government decided to respond more fully than it initially intended.

27. Another reason as to why the Government would like to respond more fully, is because of the time constraints the Commission worked under.

At first uncertainty existed on the mandate of the Commission, because the Government was of the opinion that the complaint was solved, which opinion is now confirmed in the report.

The previous Minister of Manpower was however of the opinion that the Commission should be given the opportunity to deliberate on labour matters in general. In other words: he wanted to emphasise the Commission's conciliatory function.

Agreement to extend the mandate was only reached on 7 February 1992 and consequently not even the Commission could at the time have foreseen what its final mandate would be. Therefore, notwithstanding the considerable extension of the mandate two days before the hearings commenced, the time allocated remained unchanged. This placed the Government in the invidious position of not being able to reply in detail to the voluminous submissions (± 240 pages) placed before the Commission by COSATU.

Had sufficient and reasonable time been allowed, a different finding on certain aspects might have resulted.

28. In order to clarify an aspect of the Commission's report which the Government perceives could possibly create an incorrect impression, the Government wishes to place on record that in submitting that the attitudes developed under apartheid could not be expected to change overnight, it by no means condones such attitudes. It was simply stating the factual position. As can be seen from the terms of reference of the Goldstone Commission and the terms of the Peace Accord, both of which were referred to by the Commission in its report, the Government has made its position relating to violence clear. It is committed to doing its utmost to ensure that violence and intimidation of whatever nature are halted as soon as possible.

The Government takes this matter extremely seriously and has in no way adopted an attitude of complacency.

29. The rules of evidence followed by the Commission and the value attached to such evidence in some respects are foreign to this country. In this regard two examples can be given:

29.1 Hearsay evidence is as a general rule not permitted in South African law.

29.2 Specific rules apply before evidence based on a witness' opinion is accepted.

In retrospect it is clear that had the Government reacted to certain hearsay or opinion evidence given, that evidence could have been placed in a different context.

30. The Government was also under the impression that it was not necessary to refute all incidents described, because of the conciliatory role of the Commission. In anticipation of the conciliation process certain witnesses were therefore not called.

31. The evidence given by certain witnesses must be seen against the legislative process followed in respect of labour laws in this country; the process of consensus-seeking; and the functions of the various role players.

This process can be summarised as follows:

Normally the NMC is requested by the Minister of Manpower to advise him on specific matters. On receipt of such advice, it is published by the Department of Manpower in the Government Gazette for general information and comment. Where a draft bill is subsequently published for comment, the comment received on the NMC's report is taken into consideration in drafting the bill.

Further comment is usually received on the draft bill and consultation often takes place between the Department and various role players. Comment viewed to be in the public interest is then incorporated in a bill, which is placed before a Joint Committee of Parliament. The Committee usually receives evidence which could lead to further changes to the bill.

The bill is thereafter debated in Parliament where further amendments may be proposed and accepted. The Department of Manpower is the agency which has to give effect to all these changes. A person who has not been part of the whole process may not fully understand the role the Department plays in the legislative process.

The NMC plays an important role in this process. The present NMC is, however, not considered representative of the major players. Neither COSATU nor the State is represented on the NMC. Other interests are also not represented, such as women's organisations. Members of the NMC were up until now appointed in their personal capacities, not having had a mandate to bind any organisation concerning the advice they might give. In fact, the advice could be based on an individual's personal opinion. Consequently these opinions must be weighed against the public interest.

From the above and in terms of its constitutional obligation the Department must react in the form of a response, either through draft bills or memoranda or discussions on all inputs from interested parties, including the NMC. Since the Department tries to find compromises, it may be that all parties are not satisfied with the final result, probably because it may not correspond with their own ideas. The objective however, is to find broad consensus between the major role players.

32. In respect of industrial council agreements the Minister of Manpower said the following in Parliament:

> I am aware that there are various industrial councils which are of the opinion that the Minister is obliged to publish what has been agreed upon.
>
> In cases where the Minister is requested to publish an agreement in the Government Gazette which has been reached by the parties the approach is that all agreements should be published unless they are against the public interest.
>
> In cases where agreements are extended to non-parties it must be borne in mind that published agreements are secondary legislation, a contravention of which is a criminal offence, which may have serious implications for the non-parties.
>
> It must further be borne in mind that secondary legislation is not subject to the same safeguards as applied to Acts of Parliament. In the first instance the parties to such agreement serve their own interest and thereafter the public interest. It is therefore necessary that the Minister should have a wide discretion to consider the advisability of extending agreements which bind non-parties. (Emphasis added.)

33. It is trusted that the report and the Government's response will provide a useful reference point in the ongoing reform process and that it will inspire all interested parties in South Africa to participate in the debate on a new Labour Relations Act. It is needless to say that this process will have to take into account the international principles of freedom of association, as well as the special conditions which prevail in this country,

described by the Commission as one of great beauty and resources - of people and material.

The Government of the Republic of South Africa.
